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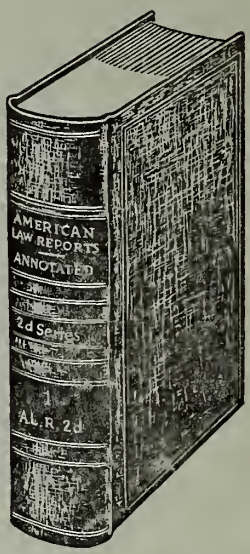

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HEARSAY

*Edmund M. Morgan**

An understanding of the hearsay rule requires an elementary consideration of the conditions which under our adversary system are imposed upon a witness testifying in open court and of the mental processes which the trier of fact must use in valuing testimony.

If we assume that *P*, the proponent of the witness *W*, desires to persuade the trier, *T*, to find the existence of fact *A*, *P*, through his attorney, will utter a series of sounds to which *W* will respond with another series of sounds. *T* must interpret these sounds and in doing so, must rely upon his sense of hearing aided by his sense of sight and his capacity for understanding and interpreting *W*'s language. Suppose that he determines that the sounds uttered by *W* make up the sentence, "I perceived *A*." In order to put a proper value on this utterance as tending to prove the existence of *A*, *T* must either consciously or instinctively go through the following mental operations: (1) He must ask whether *W* by the use of this sentence means to convey to *T* what *T* would have meant if *T* had used the same words. If not, just what does he mean to convey? The answer will depend upon *T*'s deduction as to *W*'s use of language. (2) If *T* decides that *W* wants to have *T* believe that *W* perceived *A*, *T* must then ask whether *W* believes what he had said to be the truth. If not, *T* will not use the utterance as evidence of its truth. If so, *T* has concluded that *W* believes that he now remembers that he perceiced *A*. (3) But what about the validity of this belief? Does *W* really remember or is he deceiving himself by attributing to himself the experience of another? If he has had a personal experience, how much of what he relates is he remembering and how much is he reconstructing? *T* must determine to what extent, if at all, he can rely upon *W*'s memory. (4) After determining how far *W*'s memory is reliable, *T* must then decide to what extent *W*'s mental impression at the time of his perception corresponded to what was then open to his perception. *T*'s decision will depend upon his conclusion as to *W*'s capacity and opportunity for accurate perception, and the stimuli for using that capacity at the relevant time. All this means only that *T* must use his

*Professor of Law, Vanderbilt University.

own capacity for accurate observation and his ability to interpret what is happening in his presence and must determine to what extent he can rely upon *W*'s use of language, sincerity, memory and perception.

Now if *T* decided that the series of sounds uttered by *W* make up the sentence: "Declarant told me that he perceived *A*," it is obvious that *T*'s mental operations will concern only *W*'s auditory experience and will furnish no basis for a conclusion by *T* as to Declarant's use of language, sincerity, memory or perception in his communication to *W*, except possibly what *T* can gather from *W*'s description of the details of *W*'s auditory experience. In a word upon the issue of the existence or non-existence of *A*, Declarant is the witness and *W* is only the means by which Declarant's testimony is brought to *T*. *W* is telling only what he heard Declarant say, and *W*'s testimony is hearsay.

Since we are assuming that the investigation as to the existence of *A* is in an Anglo-American court, Declarant, if present, would not be heard unless he spoke under oath or an equivalent sanction and subject to cross-examination. It would seem too clear for argument that *P* cannot avoid the imposition of these conditions upon his witness by the device of transmitting Declarant's testimony through *W*. And, generally speaking, he cannot do so. Hearsay is prima facie inadmissible.

Approaching the problem from this point of view, evidence of Declarant's conduct should be classified as hearsay wherever the conduct as described by *W* requires *T* to treat Declarant as if he were testifying upon the issue which the evidence is offered to resolve.

It may be asked, however, whether this approach is proper and to what extent the reasons for imposing these conditions upon *W* should be controlling in dealing with evidence of Declarant's conduct. The object of presenting evidence is to furnish *T* with reliable information which will enable *T* to answer a question of fact. *W* will be stimulated to tell what he believes to be the truth by the oath and by the expectation of cross-examination by the opponent. Cross-examination, if intelligently conducted, will clear up any doubts as to the meaning of the language used by *W* and will expose to *T* the defects, if any, in *W*'s sincerity, memory and perception. But it is to be noted that there is no obligation upon the opponent to cross-examine *W*, and that unless the opponent objects, even the oath may be omitted. To use the ordinary phrasing, the opponent may waive his right to insist upon the oath and may waive cross-examination. Reduced to its lowest terms, the truth is that the opponent of a party presenting a witness has a right that the trier shall not secure information from a witness who is not under oath and subject to cross-examination. If the opponent is willing to take the risk that *T* may base his answer to the question of fact upon information given *W* without the usual stimuli to truth telling and

without any testing of his use of language or sincerity or memory or perception, no effective machinery is provided to protect *T* from potential error.

On the other hand, it must not be forgotten that the judge may insist that *W* speak under oath or equivalent sanction. Under the orthodox common law rule, the judge also may cross-examine *W* where *T* is a jury; and even in the majority of our states, where the judge is forbidden to comment on the weight of evidence or credibility of witnesses, he may put properly framed questions to *W* designed to resolve ambiguities and make clear the facts. He may also of his own motion exclude evidence which it would be his duty to exclude on objection by the opponent. It is his duty, so far as possible, to make the trial a rational investigation and not permit the jury to be misled by suppression or distortion of testimony. And if *T* is the judge, he may, of course, put any pertinent questions to *W* which counsel has failed to ask. Unfortunately, judges all too frequently neglect to exercise their proper functions in these respects, particularly in jury trials, and act more as if they were mere moderators of a forensic contest.

The practical consequence of the conflict between the basic concept of the adversary system of litigation and that of a trial as an investigation for the discovery of the truth of a disputed proposition of fact is nowhere more strikingly apparent than in the rules governing hearsay. Judges and commentators, in giving verbal justification for this exclusionary rule, have frequently treated as decisive a factor which is demonstrably no more than a make-weight.

1. Baron Gilbert in the early part of the eighteenth century emphasized the lack of oath, but as early as 1668 sworn hearsay was rejected.[1]

2. Danger of error in transmission has been suggested, but written hearsay is inadmissible, though it carries no such danger.[2]

3. A supposed inherent weakness in hearsay evidence has caused a few courts to go so far as to hold that no finding can be based on hearsay that does not fall within a recognized exception; but the very great weight of authority is to the contrary.[3]

4. The inability of the jury, whose members are untrained in weighing evidence and are therefore unable to put a fair value upon hearsay, has been said by distinguished commentators and courts to be the real reason for excluding hearsay. As a matter of history this

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[1]Gilbert, The Law of Evidence 152 (2d ed. 1760, written before 1726); 2 Roll. Abr. 679, pl. 9 (1668).

[2]Robertson v. Heath, 132 Ga. 310, 64 S. E. 72 (1909).

[3]Cases collected in 104 A. L. R. 1130 (1936).

seems never to have been suggested until about the second quarter of the nineteenth century.[4] It has had influence in retarding the expansion of exceptions to the rule, and is manifest in rulings holding the erroneous reception of hearsay not to be reversible in non-jury cases on the ground that the judge had disregarded the hearsay in reaching his finding. It is, however, contrary to the holding in paragraph 3 above, which necessarily assumes the capacity of the jury to value inadmissible hearsay, and contrary to the accepted doctrine that the same exclusionary rules apply to jury and non-jury trials. Certainly no judge in a non-jury case is ever reversed for excluding hearsay which would be inadmissable in a jury case. Furthermore, error in the receipt of inadmissible hearsay in a jury case is almost always held to be cured by an instruction to the jury to disregard the hearsay.

5. Lack of confrontation of the opponent by the declarant has been advanced as a reason, but it certainly is not controlling, for the American cases make it clear that the testimony of a witness who has testified on direct examination in open court, confronting the opponent and expecting to be cross-examined by him, will be stricken on motion of the opponent if he has been deprived of the opportunity to cross-examine through no fault of his own.[5]

6. Even cross-examination of the declarant who previously testified as a witness under oath in open court will not avoid the hearsay objection where the former testimony is offered against one other than the earlier proponent or an opponent who had an opportunity to cross-examine or a person deemed by the court to be in privity with the proponent or opponent.[6]

7. If the hearsay consists of former testimony of the declarant under oath and subject to cross-examination by the party against whom it was received, and if it is now offered against the former proponent or opponent or one who is deemed a privy of the proponent or opponent, the modern cases tend to recognize that most of the dangers of hearsay do not exist. Indeed, Wigmore insists that in such a situation, the former testimony of the declarant is not hearsay, though he does not explain why it will be rejected if the declarant is available as a witness at the later trial.[7]

While each of the foregoing considerations so far as applicable to the situation in a particular case has some force, the currently ac-

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[4]See Morgan, *The Jury and the Exclusionary Rules of Evidence,* 4 U. of Chi. L. Rev. 247 (1937).

[5]*See, e. g.,* People v. Cole, 43 N. Y. 508 (1871); Sweeney's Estate, 248 Wis. 607, 22 N. W. 2d 657 (1946).

[6]*See, e. g.,* Lent v. Shear, 160 N. Y. 462, 55 N. E. 2 (1899) and discussion under Reported Testimony *infra.*

[7]Note 6 *supra,* and 5 Wigmore, Evidence § 1370 (3d ed. 1940).

cepted view is that the controlling reason for rejecting hearsay upon properly interposed objection is that the objector has the right to prevent the trier from being misled by testimony of a witness fair on its face but carrying dangers that could be exposed or eliminated by cross-examination. The emphasis put upon the right of the opponent, coupled with the neglect of many trial judges to exercise their rightful functions, results in underestimating the necessity of furnishing the trier with all the relevant information that he can adequately evaluate. Important as it may be that misleading evidence be kept from the trier, particularly a jury, it is at least equally important to a correct decision that the trier have all available, reliable relevant data. In framing a definition of hearsay so as to make it include conduct of declarant other than an assertion expressed in words or in symbols used as the equivalent of words offered to prove the truth of the matter asserted, it may be advisable to exclude much conduct which is offered for a purpose that carries some but not all of the dangers which cross-examination is deemed capable of exposing.

A. It is clear that wherever evidence of the conduct of the declarant, whether consisting of words or of other action or inaction, is offered for a purpose which does not call upon the trier to treat the declarant in any respect as a witness, the evidence has no element of hearsay in it, as in the following examples:

1. Words which are to be interpreted as they would be understood by the ordinary person in the situation of the hearer, such as, under the objective theory of contracts, words of offer, acceptance, rejection; words of gift, sale or bailment accompanying manual delivery of a chattel.

2. Words uttered in the presence of a person offered to prove that person's state of mind, as where words of notices are offered to prove that notice was given and received; or where a letter containing information concerning *X*'s credit rating by a credit organization, read by *Y*, is offered to prove *Y*'s good faith in refusing to ship goods to *X* on credit. The instances in which such evidence is relevant and involves no hearsay danger when used only to prove the hearer's or reader's state of mind are legion.

B. Where evidence of the declarant's words is offered for a purpose which requires the trier to find declarant's meaning, rather than that of the ordinary user of the words, the danger of declarant's peculiar use of language exists and could be exposed by cross-examination. But no case has been found where the existence of this danger by itself has caused the courts to classify the evidence as hearsay.

C. Where the evidence of declarant's conduct is offered to prove that it truly reflected his then existing state of mind, his sincerity is necessarily involved. Thus where evidence of his abnormal objective conduct is offered as tending to prove his insanity, it has no value if it was feigned. His sincerity is a peculiarly important element where his conduct is a positive assertion and the issue is whether he was suffering an insane delusion that the assertion was true. Thus if a woman asserted "I am the Pope," and the issue is whether she had an insane delusion that she held that high office, her belief in the truth of the statement is determinative. And yet, the courts rarely, if ever, treat such evidence as hearsay, and Wigmore agrees,[8] though Hinton dissented.[9] Speaking generally, where evidence of the declarant's conduct, other than a direct assertion that he has a specified state of mind, is offered as tending to prove his state of mind at the time, and the state of mind at that time or at a later time only is in issue, the evidence is not classed as hearsay. This is difficult to harmonize with the theory of courts and commentators that one of the chief functions of cross-examination is to expose defects in sincerity, and with the accepted justification for most of the recognized exceptions to the hearsay rule on the ground that the circumstances of the utterance furnish a guaranty of sincerity.

D. When the evidence is such that the trier may find declarant's state of mind at a specified time and the issue is his state of mind at an earlier time, the evidence, if used as a basis for inferring the earlier state of mind, necessarily involves memory. In most instances evidence of declarant's conduct at the specified time will be the basis of the finding of his state of mind at that time. Consequently, when offered as tending to prove the prior state of mind, it will carry the dangers of defects in sincerity and memory, which cross-examination is designed to expose or eliminate. Few, if any, of the decisions, however, condemn such evidence as hearsay. Thus in *Waterman v. Whitney*,[10] evidence of a testator's statements, made at various times after the execution of his will up to the time of his death, that he had disposed of his property in a manner entirely different from that provided in the will, was received as tending to prove lack of testamentary capacity. Each statement tended to prove that at the time of the statement he did not know the content of his will and his lack of knowledge and understanding at that time furnished a basis for an inference of a like lack of understanding at the time of execution.

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8 6 *id.* § 1790 at p. 238.

9 Hinton, *States of Mind and the Hearsay Rule*, 1 U. of Chi. L. Rev. 394, 397 (1934).

10 11 N. Y. 157 (1854). See also 6 Wigmore, Evidence § 1737, 1738 (3d ed. 1940) and cases cited on issue of animus revocandi and susceptibility to undue influence; cases collected 79 A. L. R. 1427, 1447, 1488. 1493 (1932), 172 *id.* 344, 354 (1948); Whitlow v. Durst, 20 Cal. 2d 523, 127 P. 2d 530 (1942); Mower v. Mower, 64 Utah 260, 228 Pac. 911 (1924).

E. If the evidence is offered for a purpose which requires the trier to go one step further back than in the situation in D, and to use the evidence of declarant's conduct as a basis of an inference, first, to his then existing state of mind, thence to his earlier state of mind, and finally to the facts producing that state of mind, sincerity, memory and perception may be involved and in many situations all three will necessarily be important. The inference from the conduct to the existing state of mind may or may not involve sincerity, but the other inferences unavoidably require reliance upon the memory and perception of declarant. In such a situation some courts fail or refuse to classify the evidence as hearsay; others see the hearsay dangers and condemn the evidence. For example, Mr. Justice Cardozo in *Shepard v. United States,*[11] after citing cases where declarant's conduct was used as a basis for an inference to his state of mind, thence to a later state of mind and action in accord with it, said "Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backward to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored." The same sort of reasoning is the foundation for the decision in *Wright v. Doe d. Tatham.*[12] But many courts fail to make such an analysis, particularly where the declarant's conduct does not consist of words.[13]

It seems clear, therefore, that while the currently accepted doctrine puts lack of opportunity for cross-examination as the crucial reason for rejecting hearsay, the courts do not classify as hearsay evidence of conduct of a declarant which requires the trier to reply upon declarant's use of language and sincerity and memory or any one or two of them, if it does not require also reliance upon his perception. But if it does require reliance upon declarant's perception, the more careful courts recognize the hearsay danger and condemn the evidence as hearsay. In the reported cases the use of the evidence involved memory also. Where the declarant's conduct is an assertion such as a witness would make in testifying, whether in words or symbols used as a substitute for words, and the evidence is offered as tending to prove the truth of the matter asserted, all courts classify it as hearsay.

Wigmore's position is that the hearsay rule applies only to an extra-judicial assertion offered to prove the truth of the matter asserted. His text does not make it clear whether he regards as hearsay evidence of the extra-judicial conduct of a person offered to prove his state of mind and the existence of the fact which created that state

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11290 U. S. 96 (1933).

125 Cl. & F. 670, 7 Eng. Rep. 559 (H. L. 1838).

13*See e. g.,* cases cited and discussion in Falknor, *Silence as Hearsay,* 89 U. of Pa. L. Rev. 192 (1940); Note, 27 N.S.L. Rev. 274 (1946). The Committee of the Commissioners on Uniform State Laws appointed to draft Uniform Rules of Evidence is proposing such a limiting definition.

of mind. By an extra-judicial assertion, he seems to mean an assertion not made under oath and subject to cross-examination in an official investigation or proceeding. He does not define assertion but does indicate that it may include non-verbal as well as verbal conduct. He therefore leaves an undefined area in which would fall cases where courts may differ as to whether the declarant's conduct, even when not consciously intended by him as an assertion, should be treated as if he consciously intended to assert the existence of the fact to prove which evidence of the conduct is offered. It would be a boon to lawyers and litigants if hearsay were limited by the court to assertions, whether by words or substitutes for words, made otherwise than by a witness in the process of testifying in the instant trial or hearing.[14] This would make both depositions and former testimony as well as admissions fall within the hearsay category. It would exclude evidence of a declarant's conduct offered to prove his state of mind and the facts creating that state of mind if the conduct did not consist of assertive words or symbols. Unfortunately, the existing decisions do not support such a simplified statement, and the trial judges and lawyers have to struggle with situations in what Professor McCormick has called the borderland of hearsay.[15]

Exceptions to the Hearsay Rule

In the light of the previous discussion as to the dangers to which the reception of hearsay exposes the adversary, on the one hand, and the obstruction to adequate intelligent investigation caused by the exclusion of hearsay, on the other, a rational test of admissability might well be (a) whether the hearsay is such that the trier of facts can put a reasonably accurate value upon it as evidence of the matter it is offered to prove, and (b) whether direct testimony of the declarant is unavailable or, if available is likely to be less reliable. But the existing authorities in this country constitute a hodge-podge of inconsistency, and make any rational generalization impossible, as the following hypothetical situation will demonstrate.

Mr. Pedestrian was run down by an automobile driven by Chauffeur. Mr. Warren saw the accident; in great excitement he called for help and Mr. Policeman quickly arrived. Warren at once told Policeman what he saw and the latter made full notes thereof. A few hours later Warren went before Notary and dictated a complete account of what he had seen and heard, and signed and swore to a correct transcription. About ten weeks later, he took this writing to Mr. Wyman, who had also seen the accident but had hurridly left the scene.

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[14]McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489 (1930).
[15]IBID.

Wyman after reading the writing endorsed it, "Exactly as I saw it." Mr. Pedestrian was immediately after the accident taken to the hospital in an ambulance called by Policeman. In private conversation with his wife, he told her how he had been run down. Later he was told by his physician that he could not recover, and soon thereafter he made a dying declaration describing fully Chauffeur's conduct in driving the car. Chauffeur was thereafter arrested and indicted for the manslaughter of Pedestrian. At his trial Warren testified fully, and so did Wyman. Chauffeur took the stand, and on cross-examination admitted that within thirty or forty minutes before the accident he had taken three or more drinks of whiskey at Zuber's saloon; that the car belonged to Mr. Masters by whom he was employed; that he had taken Mr. Masters to the railway station and seen him enter a Pullman on the Chicago train; and that after drinking at Zuber's he was taking the car back to the garage of Masters. The dying declaration of Pedestrian was introduced in evidence. Chauffeur was convicted and sentenced to imprisonment, and was fatally shot in attempting to escape.

Mrs. Pedestrian now brings action against Masters for the wrongful death of her husband. Investigation by her attorney discloses the following available evidence:

1. Record of Warren's evidence at the trial of Chauffeur. Warren is available.

2. Record of Wyman's evidence. Wyman is available.

3. Warren's affidavit indorsed by Wyman.

4. Pedestrian's dying declaration.

5. Policeman's memorandum. Policeman is available.

6. Record of Chauffeur's testimony.

7. Record of Chauffeur's conviction.

8. Mrs. Pedestrian's statement that after the funeral of Pedestrian, Masters called and told her how sorry he was, and that the accident was due entirely to reckless driving by Chauffeur who was drunk.

9. Statement by one Frank Childs that when Chauffeur was leaving the railway station after seeing Masters to the train, Chauffeur told him that he was going to stop at Zuber's and get four or five good drinks because as soon as he took the car to the garage he was going to have a holiday.

At the trial of the wrongful death action:

1. Plaintiff called Warren who testified fully on direct examination. Before opportunity for cross-examination, the court adjourned for the noon recess. While Warren was on his way to lunch, he was run down and so severely injured that he could not return or be interviewed. A physician appeared in court after the noon recess and testified that Warren would probably never be able to testify on account of injuries to his head. Thereupon defendant moved to strike the direct examination. The motion was granted, and rightly so according to practically all pertinent American cases.

2. Thereupon plaintiff called Wyman who testified that Warren had shown him the affidavit and that he had verified it as a correct account of the accident. He called also the Notary who swore as to the circumstances in which the affidavit was made. Plantiff's offer of the affidavit in evidence was correctly rejected as pure hearsay.

3. Plantiff offered in evidence the record of the testimony of Warren in the criminal prosecution of Chauffeur, after proper verification of it as a correct record of Warren's testimony by the court reporter who took down the testimony of Warren as it was given. This was rejected because it was hearsay and not within the exception for reported testimony, since neither party to this action was a party or claiming under a party in the criminal prosecution.

4. Plaintiff called Wyman who testified that he had entirely forgotten everything about the whole matter except (1) that he had seen some such accident and that ten weeks or so later he had read Warren's affidavit and then believed it to be correct, and (2) at the criminal trial he had testified and at that time he had refreshed his memory by reading Warren's affidavit and had told what he then actually remembered about the accident. A present reading of the memorandum did not refresh his memory, but because of his indorsement he believed that it stated the truth. The plaintiff's offer of the indorsed affidavit was rejected because the verification was not made "at or about the time of the matter recorded." Plaintiff's offer of Wyman's testimony in the criminal prosecution was rejected on two grounds: (a) Wyman was available and (b) neither party to the action was a party to the criminal case.

4. Pedestrian's dying declaration was rejected because evidence of such a declaration is admissible only in a criminal prosecution for the homicide of the declarant.

5. Plaintiff's offer of Chauffeur's testimony in the criminal prosecution was rejected. As former testimony it was inadmissible for the reasons given for rejecting evidence of Warren's and Wy-

man's testimonies. It was not within the exception for declarations against interest, for that exception is limited to declarations against pecuniary or proprietary interest.

6. Plaintiff's offer of the record of Chauffeur's conviction was rejected because the conviction on analysis was nothing more than an expression of opinion of the jury based on hearsay testimony, the record of which would be inadmissible in this case. This is the orthodox rule, recently affirmed in England and still recognized by the majority of our decisions.

7. Plaintiff next called Policeman, who testified that he heard Warren's call and immediately rushed to the scene and that Warren in great excitement made a statement which his notes enabled him to remember. Over defendant's objection he was permitted to state what Warren told him, because it was made under the stress of a nervous excitement caused by the event which the statement describes.

8. Plaintiff then called Frank Childs and over defendant's objection Childs was permitted to state what Chauffeur had said about intending to drink at Zuber's saloon. This was allowed because the statement was a declaration of a presently existing state of mind offered to prove the intention as a basis for the inference that the intention was carried into action.

9. Plaintiff finally called Mrs. Pedestrian who testified to defendant's admission that the accident was caused by Chauffeur's reckless driving while drunk, in spite of the fact that Masters could not possibly have had first hand information of the subject matter of his testimony. This ruling is in accord with the majority of decisions concerning confessions.

It will be noted that the court rejected (1) the testimony of Warren giving under oath, confronting the defendant and expecting to be cross-examined by him, (2) his testimony given in the criminal case in which he was subject to full cross-examination by a party vitally interested in overcoming it and exposing its weakness, (3) his affidavit made when the matter was fresh in his mind and when he had no possible motive to misrepresent, (4) Wyman's adoption of Warren's affidavit made at a time when Wyman remembered the matter recorded, (5) Wyman's testimony in the criminal case when subject to full cross-examination, (6) Pedestrian's dying declaration deemed of sufficient value to be used and actually used against a defendant in a criminal prosecution, (7) Chauffeur's testimony adverse to himself given in a criminal prosecution wherein he must have known its highly damaging effect.

(8) Chauffeur's conviction in a case in which his guilt had to be proved beyond a reasonable doubt and in which he testified.

On the other hand, the court received (1) Warren's statement made without oath, with no possibility of cross-examination, while he was laboring under great excitement—a circumstance which psychologists tell us tends to make narration more than usually inaccurate, (2) testimony of Childs as to Chauffeur's intention to take several drinks to prove that he did so, after rejecting Chauffeur's own statement that he had taken them, and (3) an admission by Masters who concededly had no perceptual knowledge of what he was talking about.

It is possible to explain these bizarre rulings by occasional resort to history, or by talking now of circumstances tending to induce veracity or to negative any motive to falsify, and talking next of the logical concomitants of our adversary system of litigation; but never talking of both together. But neither this sort of disclosure nor the genius of a Wigmore can give our law of hearsay, as applied in orthodox decisions, anything more than a superficial appearance of rationality.

ORAL ARGUMENTS IN APPELLATE COURTS—A FORBIDDEN ART

*J. P. Coleman**

Oral arguments, as we know it today, is as old as litigation itself. It must have flourished centuries before the written argument, or brief, came into customary use. Its impact upon the destiny of individuals and even of nations, could be made the subject of many interesting volumes.

No less an authority than James Madison stated that the American Revolution was born in a New England court in a masterful address by James Otis, a lawyer, attacking the Writs of Assistance. It is likely that very few Americans, even lawyers and judges, have stopped to consider that our much prized Independence, and all that it means to the world, received its first successful impetus from an oral argument. I think every judge and lawyer must experience indescribable pride when he reads of the many masterful oral arguments delivered in former days in the Supreme Court of the United States by such men as Daniel Webster. Beveridge tells us of the climax to Webster's argument in *The Dartmouth College Case:*[1]

> "Goodrich describes the scene in the court-room, during these two or three minutes, Thus: 'Chief Justice Marshall, with his tall and gaunt figure bent over as if to catch the slightest whisper, the deep furrows of his cheek expanded with emotion, and eyes suffused with tears; Mr. Justice Washington at his side—with his small and emaciated frame, and countenance more like marble than I ever saw on any other human being,—leaning forward with an eager, troubled look; and the remainder of the Court, at the two extremities, pressing, as if were, toward a single point, while the audience below were wrapping themselves round in closer folds beneath the bench to catch each look, and every movement of the speaker's face.' "

Beveridge further states:

> "The argument was one of the shortest ever made in a notable case before the Supreme Court during the twenty-eight years of its existence up to this time (1818). Not three full days were consumed by counsel on both sides—a space of time frequently occupied by a single speaker in hearings of important causes."

He then points out that in the argument of *M'Culloch v. Maryland,* Luther Martin alone spoke for three days.

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*Attorney General, State of Mississippi, Jackson, Mississippi. From an address delivered to the Fifth Judicial Conference, New Orleans, Louisiana.

[1]Beveridge, *The Life of John Marshall* (Boston and New York: Houghton Mifflin Co.) 1916-1919, IV, 249.

Argument in the Supreme Court of the United States is now limited to one hour on each side in cases on the regular docket, except where questions have been certified, and unless more time be granted before the argument begins.[2] Three-quarters of an hour to each side is allowed in cases where questions have been certified to the Court.[3] One-half hour is allowed to each side in cases on the summary docket.[4]

Time for argument may be extended in cases on the regular docket. The practice is to file with the clerk a request to the Court, stating reasons for an extension.

This may be contrasted with the rule in the Supreme Court of Mississippi which allows thirty minutes to the side. Extension may be obtained by application ore tenus to the presiding justice, but if extension is allowed the case goes to the heel of the docket and is heard after all others. The result is that there are very few applications for extension. The lawyer dislikes having his case heard last, after the court has possibly heard many others and may have become somewhat physically, if not mentally, fatigued. There are also other practical considerations, such as not wishing to be the one to ask for an added burden on the court. Some attorneys have a feeling, also, that a request for additional time indicates a lack of confidence in the position he must maintain, or, to say the least, he fears that he thereby concedes himself to be the unhappy possessor of "the laboring oar." It often happens that neither side will assume the position of requesting it. After argument that cannot amount to much more than a sketchy statement of the case, the Court is then relegated to the briefs and the record. And in the Supreme Court of Mississippi the record and briefs are not read until after argument, if any, has been heard.

I will admit that there must be reasonable limitation on oral argument. The exceedingly greater volume and complexity of litigation as compared to former years, as well as the orderly operation of the courts, make unlimited argument an impossibility, even if it were otherwise desirable.

I sincerely feel, however, that the uninterrupted tendency of many years toward continued limitation of oral argument in appellate courts, whether accomplished by rule or by practice, should be reversed and that reasonable relaxation of such limitations would be for the best interest of the bench, the bar, and the litigants whose rights are determined in the courts. I believe the overwhelming majority of the members of the bar are in accord with this proposition.

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[2]Rule 28, ¶4. Prior ot October 21, 1918, the time limit in cases on the regular docket was one and one-half hours to the side.

[3]Rule 28, ¶ 5.

[4]Rule 28, ¶ 6.

There are several ways by which this desirable result could be accomplished without hampering the orderly procedure of the courts. I respectfully submit the following ideas:

1. Counsel on appeal should be required to submit a brief written statement of the case, and the amount of time needed for oral argument. When the case is docketed for oral argument, the Court could very quickly examine the statement of the case, consult the recommendations of the attorneys as to the time desired, and specify the time for oral argument of the case. I should hope that this system would not place too much added burden on the court, but, on the other hand, would give it the advantage of knowing the feelings of counsel as to how much time is actually needed.

The procedure in the Fifth Circuit is that the briefs are read in advance of argument and the Court has thus improved upon the above suggestion. However, the net result is that the average argument is generally limited to thirty minutes to the side. Of course, appellate counsel has not had the long experience which the Court has accumulated in immediately grasping the crucial question which must determine the case. I think it must be admitted that counsel, therefore, cannot hope to match the Court for adeptness in this field. Yet, it must also be admitted that the judicial mind is always open until the opinion of the court is finally resolved. Therefore, there should be no harm in allowing counsel full time to expound his argument, even though he may be altogether wrong in the position he takes. He owes it to the Court to do his best to offer sound argument. He should remember that the function of the argument is to shed light, not heat, upon the subject. Possibly counsel, in their zeal, have not always remembered to stay within these restrictions, and that may have done a lot to bring about the existing limitations. Be that as it may, it strikes me that the logical mind may find considerable inconsistency in a system which has as yet devised no limitation on the written argument while very definitely limiting oral argument.

A written "brief" is not always brief. And some lawyers think that because the adversary has compiled four hundred pages on a question, then he must go and do likewise, even if most of it is irrelevant and is actually a cross that no judge should have to bear. In oral argument, however, counsel is personally in the presence of the Court, and he is in the presence of his adversary, who is, of course, quick to expose all possible chinks in his legal armor.

In the light of these considerations, I believe we should devote some real study to limiting the size of written briefs, and liberalizing the length of oral argument.

2. Implied penalties for seeking additional time, such as being required to go to the heel of the docket, should be abolished.

3. There is another side to this question that I should like to submit in deepest respect and in all humility. I refer to questioning counsel during the course of his argument. That such questions can be of the greatest benefit to both judge and attorney is beyond question. It does happen, however, that sometimes these questions and the respectful answers to which they are entitled consume a large portion of the time alloted to counsel. Please bear in mind that I am not attempting to criticize the judges for asking the question. I do believe, however, that, if possible, an attorney should be given half of his alloted time, without interruption, in which to attempt to launch his boat. If by that time he continues to flounder or miss the points which the court would like to hear discussed, then let him face the interrogatories. It would further seem that if questions are asked, then the attorney should be given an extension of time equal to that consumed by the questions and answers. There might be some small difficulty in working out the mechanics of such a system, but I would think that it could offer no real problem if the court should see fit to adopt it as a policy.

I would like to point out that if our appellate courts should see fit to be more liberal with the privilege of oral argument, corresponding duties should certainly devolve upon counsel. They should remember the following principles:

(1) There should be no argument merely for argument's sake;

(2) Time not actually needed should be left for those who do need it;

(3) The only justification for any argument at all is that it shall be intended to assist the court in reaching the right of the case.

I have examined the rules of the nine Circuit Courts of Appeal, as well as the rules of seven State Courts of Last Resort. I find the time limit in California, Illinois, and Ohio is thirty minutes to the side. The time limit in Alabama, Massachusetts, and New York is one hour.

None of the limits in the Circuit Courts of Appeals is in excess of one hour, with five of the Circuits imposing a forty-five minute limit. The rule in each of the Circuits, and in each of the states that I have had an opportunity to study, provide for extension by leave of the court. I suppose it could be said then that by its own rules, and as a matter of inherent right, every court can establish such policy as to it seems best.

I, therefore, respectfully submit for the consideration of our judges that limits on oral argument have now reached an irreducible minimum.

I respectfully further submit that serious thought should be given to the idea of allowing counsel a wider opportunity of living up to the responsibilities of more extensive oral argument.

TAX SAVINGS IN THE SALE AND EXCHANGE OF REAL PROPERTY

*Joseph Berman**

Although the federal tax laws, as codified in the Internal Revenue Code, are carefully and scrupulously worded, they are adaptable to changing economic conditions and to the dynamic interpretation by the courts. In distinguishing sham from reality the courts have devised instruments such as the business purpose and the net effect rules to enable them to more accurately discover the truth. In view of these facts it is necessary to be particularly careful when presented with a panacea for the solution of our tax problems. Often such solutions are merely hasty generalizations or oversimplifications drawn from a cursory examination of some of the factors involved.

Money derived from the sale or exchange of property sometimes gives rise to particularly vexing problems. This is due to the fact that the proceeds arising from such transactions, whether realized as cash or in the form of other property, are not always to be regarded as income. In most cases, they are a return of capital. Whether they include any taxable income or serve to reduce taxable income because they fall short of a complete restitution of the capital investment must be determined by computation.

In determining whether a client derived a gain or suffered a loss during a taxable period, it is necessary to ascertain whether the transaction was an "exchange" or "sale," and if it was an exchange, whether it is regarded as an immaterial change in the form of the client's original investment. If a gain or loss is recognized, and no provision of the law prevents a deduction of the loss, obtain the net result by comparing the proceeds with the client's capital investment. This comparison must be made in the light of the rules governing the determination of the specific time to which the law allocates the gain or loss. In all cases it must be determined: (1) Does the transaction constitute an exchange or a sale? (2) How is the gain or loss computed? (3) What is the proper taxable year for reporting client's gain or loss?

Assume that the client is an ordinary investor, not a dealer in real estate. Usually, the acquisition of realty or other property is not a taxable event, but its receipt may mark the approach of taxable income. When property is received as compensation or as a dividend in kind, it is income. Gain or profit is not taxable unless it has been realized. Realization determines not only whether a gain is taxable, but also the time when it becomes taxable. Only in such instances as the special treatment of long term capital gains, or the elimination of pre-1913 appreciation

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in computing a gain, will there be required consideration of the time to which a gain is economically attributable.[1]

Generally, bargain purchases from an employer bring about income to the extent that the fair market value exceeds the purchase price. Bargain purchases by a stockholder from a corporation which he controls may be considered as taxable dividends in disguise. The scope of this article does not include a consideration of the problems created by the distribution of property resulting from the dissolution or reorganization of corporations, or which spring from the redemption of stock.

Real property is customarily acquired by devise, gifts, or purchase. These are not tax-precipitating events in and of themselves; however, complications can and do often arise immediately upon purchase. Assume that the buyer, under his agreement with the vendor, has the right to pay all or a part of the purchase price in items such as mortgage certificates or other existing claims against the vendor. Suppose that the buyer obtains these claims below face value and then presents them to the vendor and receives credit for the full value of the property acquired. A number of courts have held in such instances that no taxable gain arose by virtue of the transaction and that the apparent gain is merely an amount by means of which the ostensible purchase price was adjusted downward to the true purchase price. The rule is that the buyer does not realize taxable income when he acquires specific property at a discount for application to the purchase price, where, under his contract for acquisition the purchase price may be so paid. This is based on the proposition that the acquisition and payment over of the specific property and the main purchase form one whole transaction.[2]

When real estate is acquired in the purchase of an entire business, the buyer should allocate the purchase price to each particular group of assets obtained. He should break down the purchase price and assign a portion of it to each of the items in the contract of purchase. In order to accomplish this, the buyer must reach an agreement with the vendor concerning the proper allocations. An agreement of this nature, unless obviously a sham, is usually respected by the courts. Ordinarily, the buyer of real estate is prompted to allocate a greater purchase price to buildings than to land, so as to provide for greater deductions for depreciation. We must remember that there are subject to depreciation many land improvements such as parking lots established to service customers or employees, driveways, loading areas, spur tracks, and artificial lakes. If an engineering appraisal is obtained and one is careful in the listing of separate items, the net result may be the allocation and establishment of remaining life and values in the property acquired or sold

[1] INT. REV. CODE § 22 (a); Eisner v. Macomber, 252 U. S. 189 (1920); Doyle v. Mitchell Bros. Co., 247 U. S. 179 (1918).

[2] P-H 1946 TC MEM. DEC. ¶ 46,149 (1946).

which will yield substantial depreciation deductions in future years. One must remember that land can be improved, and since such improvements are considered as capital items subject to exhaustion, they are recoverable through deductions for depreciation.

The purchase of property subject to a long term advantageous lease poses a problem. In such a case the Commissioner of Internal Revenue resists allocation of the purchase price to its component parts, the property and the lease. It is consequently important in such a case that in the purchase contract the amount paid for the leasehold be segregated from the amount paid for the property subject to the leasehold. It is also advisable in such cases that the leasehold be obtained first in a separate complete transaction, prior to the acquisition of the fee. Better still, let one person obtain the lease and another obtain the fee.

Buyers of property often consider leasing it first with an option to subsequently buy. The reason for this is that the buyer desires to get a full rent deduction and at the same time obtain ownership of the property at a low cost which reflects the rental already paid. This device is dangerous since the Commissioner of Internal Revenue may disallow the rental deduction and treat as income the periodic payments received by the lessor.[3]

All expenses arising out of architects' services, searches, surveys, and other work incidental to acquisition and perfection of title are part of the cost of the property and therefore, not deductible. The same rule applies to costs of defending title or removing a cloud on the title; therefore every expense should be carefully scrutinized. Costs of title searches, surveys, and similar costs spent in order to get a mortgage loan should be written off over the life of the loan. Survey expenses and similar expenses incurred in order to protect the property against adverse possessors and squatters are deductible, since they are connected with the use of the property. Expenses incurred in ejecting a trespasser are deductible, since they are connected with the enjoyment of the income from the property. All expenses incurred in order to enforce and protect the proprietor's rights to rents are deductible. Legal fees properly allocated can also be deducted.[4]

A buyer having indefinite ideas concerning the demolition or removal of a building on property which he is acquiring will not get favorable consideration from the Commissioner as to demolition deductions in the year in which the property is razed. Since the criteria is the buyer's

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[3]INT. REV. CODE §§ 22, 23.

[4]Bemis v. Becker, 104 F. 2d 871, *cert. denied*, 308 U. S. 613 (1939); Commissioner v. Laguna Land & Water Co., 118 F. 2d 112 (9th Cir. 1041); Schmidlapp v. Commissioner, 96 F. 2d 680 (2nd Cir. 1938); Commissioner v. Wobber Bros. 94 F. 2d 1011 (9th Cir. 1938); John B. Hollister, 44 B.T.A. 851 (1944); Gibbs & Hudson, Inc., 35 B.T.A. 205 (1939); Lewis K. Walker, 35 B.T.A. 640 (1937); H. F. Bovard, 15 B..T.A. 546 (1938).

intention at the time of acquisition, it is imperative that he make his intention clear and certain by his actions and records. To avoid loss the buyer should clearly indicate his intentions at the time of the acquisition. Lack of intention to raze the building may be inferred from improvemen and use of the building.

If the purchase is made with the intention to raze the building, the entire cost is capitalized as land; therefore the cost of razing will become part of the cost of the land.[5] Depreciation is not allowed during the interval before razing, nor does a delay in demolition make a deduction allowable if the building is ultimately razed.

If the intention to raze is not clearly indicated at the time of the purchase, the cost is allocated to the land and to the building in accordance with the terms of the purchase agreement. If no segregation of the purchase price is made in the contract, an equitable allocation may be based on appraisal, tax assessments, or similar criteria. If, after the purchase, in a new course of action, the owner razes the building, he will then be allowed a demolition loss of the unrecovered cost of the building.

If the building was bought with no intention to raze it, and subsequently it is demolished and a new structure is erected on the site, the expense of demolition will not be allowed, and the unrecovered cost of the old building must be capitalized as part of the cost of the new.

Where the owner razes a building to clear the site so that the lessee can erect a new building, the demolition loss will most likely be allowed. There seem to be no cases in point, but it is reasonable to expect that the unrecovered basis of the old building will be capitalized as cost of the leasehold and amortized over the life of the lease.[6]

Real property contracts of sales usually provide for adjustment of taxes on title day. Determination of this day is important in ascertaining to whom the tax deductions are allowed. In *Magruder v. Supplee*[7] the Court rejected a theory of accountancy under which such taxes accrue daily. The Court held that the taxes accrue on due date only when the liability is definitely established; the taxes then become a lien on the property.

In 1942 Congress enacted legislation which altered the ruling in *Helvering v. Bruun*.[8] Since that time income to the lessor has been realized if the tenant makes improvements to the property. This result can be avoided if the lessor does not require the tenant to make the improve-

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[5]U. S. Treas. Reg. 111, § 29.23 (e)-2.
[6]*Ibid.*
[7]316 U. S. 394 (1942).
[8]309 U. S. 461 (1940).

ments and the lessor does not accept such improvements as payment in kind for the rentable due under the lease.[9]

Ordinarily, taxpayers are entitled to recover the "basis" of property without incurring a liability for income tax. This basis is the cost of the property to the taxpayer.[10] The law treats cost as the foundation, other figures as exceptions, and uses the word "basis" as a convenient common denominator for both. In effect, then, basis means basis for computing gain, loss, or depreciation.

An easement, or any other incorporeal right in land, can be considered as real estate. The sale of an easement does not produce taxable income[11] because no specific part of the basis can be allocated to the sale. The basis in such a case must be reduced by the sale price.

Commissions in connection with the sale of property are not separately deductible, except in the case of a real estate dealer or operator. Such commissions are treated as adjustments to the gross selling price. Numerous problems are created by owners who desire to sell property immediately and defer the tax impact to another time. Such problems were noted by the Court in *Commissioner v. Court Holding Company*[12] but it is reasonable to believe that they were firmly answered in *United States v. Cumberland Public Service Company*.[13]

When title and possession pass at the same time, the sale is completed and usually the taxpayer has taxable income. By electing payments on an installment basis one can obtain the privilege of spreading the gain and the tax. Ordinarily the vendor's accounting system does not affect the realization of gain. When the payment of the sale price is deferred, the same effect can be accomplished by a mortage that has a market value; therefore, whether the taxpayer is on an accrual or a cash basis, the sale in such case marks a taxable event.[14]

The vendor may postpone the advent of a tax by giving an option to purchase to the prospective buyer. In such a case the vendor can protect himself against the buyer's failure to exercise the option by getting a substantial deposit which will be applied to the purchase price and which is forfeitable on failure to exercise the option. Payment for the option is not income. The profit from a sale completed by the exercise of the option is taxable in the year in which the option was exercised by the purchaser. In the case of a lessee who has an option to buy at a

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9INT. REV. CODE § 113 (c); Greenwood Packing Plant v. Commissioner, 131 F. 2d 815 (4th Cir. 1942); Therese C. Johnson, 7 T. C. 465 (1946).

10INT. REV. CODE § 113 (a); Detroit Edison Co. v. Commissioner, 319 U. S. 98 (1943); Tube Bar, Inc., 15 T. C. 922 (1950).

11G. C. M. 23,162 1942-1 CB 106.

12324 U. S. 331 (1945).

13338 U. S. 451 (1950).

14Nina J. Ennis, 17 T. C. 465 (1952).

price reduced by the rent he previously paid, the rental being fair, the rental due before the exercise of the option is ordinary income and the amounts due thereafter constitute the selling price of the property. Where the rent greatly exceeds the rental value, and the exercise of the option is assured because the option price is a good deal less than the anticipated value of the property, the entire rental is selling price.[15]

When interim rentals are considered part of the sales proceeds, when shall they be reported as income? The periodic receipts are not considered income and are credited to the basis. Only when the basis is fully recovered are subsequent receipts considered proceeds from the sale of property, even though the right to deductions for depreciation shifted to the buyer.

Often gains can be postponed by accrual and cash basis sellers through escrow arrangements, if the transactions are at arms length and through independent escrow arrangements.[16]

The sale of property on the installment basis necessitates the payment of taxes on income which may never be realized, or which may not be converted into cash for a considerable period of time. The tax on the profit could exceed the entire amount of cash received in the taxable year and leave the taxpayer with no available funds. To remove the possibility of hardship on this type taxpayer the law permits certain taxpayers to report such income only as it is realized by the receipt of cash or property other than obligations of the purchaser.

When the installment method is applied, the following advantages can be obtained: (1) The amount of the initial payment can be controlled by placing part of the purchase price in escrow. (2) Where cash is needed, the notes or purchase money mortgage may be immediately sold, yet the proceeds are not counted as part of the initial payment. (3) The buyer's notes or other obligations can be secured by gilt-edge security without any danger that the thirty per cent payment limitations will be exceeded.[17]

When using the methods mentioned above, the following pitfalls must be avoided: (1) The vendor does not qualify for the installment method if there is no payment in the first year and a lump sum payment in the following year. (2) Where the contract binder is received in one year and the closing takes place in the next, the binder deposit must be

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[15]G. C. M. 23,677 1943 C. B. 370; Commissioner v. Smith, 324 U. S. 177, *rehearing denied,* 324 U. S. 695 (1945); Helvering v. San Joaquin Fruit & Investment Co., 297 U. S. 496 (1936); Aiken v. Commissioner, 35 F. 2d 620 *aff'd,* 282 U. S. 277 (1931).

[16]Center Investment Co., 43 B.T.A. 46 (1944); Preston R. Bassett, 33 B.T.A. 182 (1935); Federal Development Co., 18 B.T.A. 971 (1931).

[17]Corbett v. Commissioner, 50 F. 2d 492 *cert. denied,* 284 U.S. 646 (1931); P-H 1945 TC MEM. DEC. ¶ 45,296; Tennessee Mining & Mfg. Co.. 46 B.T.A. 1278 (1942); T. F. Sanford, 22 B.T.A. 1254 (1931).

included in the initial payment. If it is overlooked, the seller may unwittingly exceed the thirty per cent limitation. (3) If there is a pre-existing mortgage on the property sold, the initial payment includes the excess of the mortgage over the vendor's basis. If the purchaser is also the mortgagee, the entire mortgage must be included in the initial payment, since the debt is merged with the fee.

Deferred payment sales are comprised of only those sales which do not qualify or were not elected for the installment method of accounting. In these sales the obligations of the buyer must be considered, at fair market value, as part of the sale price. Such obligations almost always have a fair market value. By evaluating such obligations at too low a figure, taxpayers foolishly convert a capital gain into ordinary income. Any excess over that valuation is treated as ordinary income when the payments are collected. If the obligations obtained had no market value, the reportable income, when collected, is capital gain and not ordinary income.

Recently, sellers have used an arrangement in which the sale price is some indefinite amount, such as a percentage of the buyer's sales for a number of years. Until a basis is recovered no taxable income arises, since the selling price is indeterminate.[18]

The sale price of property includes the mortgage on it, whether or not the mortgage is the personal responsibility of the vendor. It is immaterial whether the sale was voluntary or involuntary.[19] Destruction by fire, storm, or other catastrophe is not considered to be a sale. If the mortgage is greater than the value of the property, it is wiser to make a gift of the property or to abandon it. Write the property off the books, pay no taxes on it, and abandon it.

The courts do not favor sale and lease backs when they are tax-oriented in order to get a deductible loss from the sale of the fee or to get indirectly the depreciation on land or depreciated property. Such sales will be treated as disguised loans and the rental payments as amortizations of the loan and interest. Since the interest may not be explicit or determinable in such cases, no deduction for it will be allowed.[20] If such a transaction is used, it is advisable to negate the idea of a gift by making the sale to a financing institution or insurance company rather than to a charitable organization. Furthermore, the lease should be for less than thirty years, the sales price should be fair, the property should be offered competitively to a number of purchasers, renewal rights and repurchase

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[18]U. S. Treas. Reg. 111, § 29.44-2; Commissioner v. Logan, 283 U. S. 404 (1931); Joseph Frost, 37 B.T.A. 190 (1944); Berman, *Valuation of Property for Estate, Gift and Income Tax Purposes*, 29 CHI-KENT REV. 321 (1951).

[19]Crane v. Commissioner, 331 U. S. 1 (1947).

[20]Standard Envelope Mfg., 15 T. C. 41 (1950).

options should be avoided. If an option to repurchase is intended to be effective, the repurchase price should be based on the true value of the property at the time the option may be exercised.

The taxpayer usually acquires residential property through purchase, gift, inheritance, or legacy and uses it as his personal residence. Sometimes the property is used by the taxpayer as his residence up to the time of the sale; sometimes the taxpayer rents the property or otherwise appropriates it to income-producing property before selling it. Any gain resulting from the sale of residential property is taxable in the year of sale as capital gain, unless the taxpayer purchases another residence within a certain prescribed period. If property is purchased, the gain is the cost to the taxpayer; if the property is a gift acquired after December 31, 1920, the starting point is the cost to the donor. If the property is inherited, the starting point is its fair market value at the date of decedent's death. This basis is increased by the cost of any improvements made between the acquisition and sale. No reduction is made for depreciation.

The gain derived from a residence converted to income producing property is determined by reference to the starting point. Losses are determined in such cases by ascertaining the conversion value. If the conversion value is lower than the basis, the conversion value must be used as the starting point.[21] In view of the fact that the property was converted to income producing property the taxpayer may deduct annually a certain amount as depreciation. The statute provides that the proper basis for depreciation is the same as the basis for determining gain.[22]

Conclusions

The "closing date" of a sale determines the holding period of the seller and the buyer; the period of the former terminates as the latter's period begins. The "taxing date" determines the time when the seller must report his gain. This date may be the same as the closing date of the sale, or it may be later. Obviously, there are times when it is advantageous to postpone the closing date or the taxing date of a sale. The taxing date may be postponed by any one of several methods used to postpone the closing date. Option agreements postpone the closing date until the option is exercised. Executory contracts of sale postpone the closing date until performance. Condidtional contracts of sale postpone the closing date until the conditions of the contract are fulfilled. Leases with purchase options postpone the closing date until the option is exercised.

The taxing date may also be postponed by postponing the date of payment. Installment sales postpone the taxing date until the receipt of installments if there is a gain on the sale, but such an arrangement can-

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21U. S. Treas. Reg. 111, § 29.23 (e)-1; Henier v. Tindle, 276 U. S. 582 (1928).
22INT. REV. CODE § 114 (a).

not be used to postpone a loss. Deferred payment sales can be used to postpone the taxing date where more than thirty per cent has been given by the buyer as a down payment or where the sale does not otherwise qualify as an installment sale. Escrow arrangements give the seller security and at the same time permit him to postpone taxability on the sale until the escrowed funds become available to him. Indefinite price agreements, whereby the sale is made for cash plus a percentage of earnings for a specified time, spread out the reporting of gain over the period in which payments are made. Tax free exchanges offer a means of postponing gain on the sale until the owner makes a taxable disposition of the property acquired in the exchange.[23]

If an individual is not a dealer in securities, the sale of stock will usually produce capital gain or loss even if the sale of the assets underlying the stock would produce ordinary income or loss to him. Property transferred to a corporation in a tax-free exchange retains the same basis it had in the transferor's hands, and the stock received by the transferor takes the same basis that the property had in his hands.

If property owned by an individual is to be sold and is of such a nature that gain on the sale will be taxed as ordinary income, it may be desirable to transfer the property to a corporation in a tax free exchange and then to sell the stock. By so doing the gain can be converted from ordinary income into capital gain on the sale of stocks. If the individual's income places him in a high tax bracket, it will be less costly taxwise to have the corporation sell the property and then dissolve than it would be to have the individual sell the property himself. Even if the purchaser objects to buying stock, prior incorporation of the property and sale of the property by the corporation will still result in benefits to the seller. Formation of the corporation should precede the actual sale by as great a period as possible. If the property value has declined below its cost basis, transfer of the property to a corporation prior to sale may facilitate the sale. The buyer can then buy the stock and obtain control of the corporation holding the property at a geater basis than his cost for the stock. If the owner of property is the controlling stockholder in a corporation which has income against which the loss may be offset, it is frequently desirable for the individual to transfer the property to the corporation and let the corporation make the sale. This procedure permits a double deduction of the loss. It may eliminate any danger of the penalty tax on corporate accumulations and may also have the effect of keeping a like amount of dividends from being distributed and taxed to the individual at ordinary income rates.[24]

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[23]INT. REV. CODE §§ 117 (a)-(e); U. S. Treas. Reg. 111, §§ 29.117-1, 2, 3; Sic v. Commissioner, 177 F. 2d 469, *cert. denied*, 339 U. S. 913 (1950); Mather & Co. v. Commissioner, 171 F. 2d 864, *cert. denied*, 337 U. S. 907 (1949).

[24]INT. REV. CODE § 117 (j).

Real properties of a like kind may be exchanged tax-free if, in respect to each party, the property transferred was held for productive use in trade or business or as an investment, and the property received is acquired in order to be held for productive use in trade or business or for investment. In a tax-free exchange each party takes as cost basis for the property he receives the cost basis of the property he transferred. In a tax-free exchange of unencumbered realty, where cash or other property is also transferred by one or both of the parties to the exchange, the recipient of cash or other property which cannot be exchanged tax-free has taxable gain to the extent of such cash and/or other property. If one of the items of realty in a tax-free exchange carries a mortgage, the transferor of the mortgage will have taxable gain to the extent of the mortgage. If both items of realty in a tax-free exchange are encumbered by mortgages, the party that receives a net deduction in mortgage indebtedness as a result of the exchange has taxable gain to the extent of the reduction.

In a tax-free exchange of realty involving mortgages and cash transfers, certain principles determine each party's gain. If indebtedness is reduced and cash is received, gain is taxed to the extent of the debt reduction plus the cash received. If indebtedness is reduced and cash is paid, gain is taxed to the extent of the debt reduction. If indebtedness is increased and cash is received, gain is recognized to the extent of the cash received. If indebtedness is increased and cash is paid, no gain is recognized. These rules are subject to the qualification that irrespective of the amount of debt reduction and/or cash received, the amount of taxable gain cannot exceed the actual gain involved.

Tax savings can be obtained in several different ways. If the owner of realty desires to dispose of it and acquire similar property, he should seek to consummate a tax-free exchange rather than to sell the property and subsequently purchase similar property. This postpones indefinitely the gain or loss on the disposition of the transferred property. Conversely, if it is desirable to have gain or loss recognized on the disposition of property, the transferor should sell his property and use the proceeds to buy the desired property. Whether it is desirable to have a tax-free exchange or a taxable disposition of real property can only be determined by taking into account the particular tax situation of the transferor. For example, where depreciable property will be received in the exchange and the exchange will be at a profit, the consummation of a taxable disposition of the property will produce an increased cost basis for the acquired property. Thus, the gain which is taxed at capital gains rates can be depreciated against ordinary income. In a partially tax-free exchange of properties of unequal value, if the property of the party who would transfer the cash to equalize values is mortgaged, the party should use the cash to pay off or reduce his mortgage prior to the exchange. This will reduce the taxable gain of the other party by the same amount and

will also reduce the taxable gain of the first party to the extent that the mortgage on his original property exceeded the mortage on the other party's original property.[25]

If an owner of property transfers it to another, regardless of the nature of the terms of the transfer, he will be deemed to receive an amount equal to the unpaid balance of any outstanding mortgage, in addition to any other consideration received. Foreclosure will result in a sale for tax purposes despite the fact that the owner has no personal debt which is satisfied as the result of the foreclosure. Satisfaction of the mortgage debt for less than face value, other than by transfer of the property itself, results in no taxable income accruing to the owner, but his basis for the property is reduced by the amount of the debt reduction.

If the value of the property is less than the mortgage, and the basis of the property is greater than the mortgage, the owner should abandon the property or transfer it to the mortgage without consideration. This will give the owner an ordinary loss which is fully deductible from income, rather than a capital loss, the deductibility of which is limited Where both the value and the basis of the property are less than the amount of the mortgage, the owner should not abandon it to the mortgagee or otherwise transfer it without consideration. He should insist upon consideration from the mortgagee or, if the mortgagee refuses, he should await foreclosure. His gain upon transfer for a consideration or upon foreclosure will be a capital gain, whereas his gain upon transfer without consideration would be ordinary income.[26]

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[25]INT. REV. CODE §§ 112 (b), (c), 113 (a); U. S. Treas. Reg. 111, §§ 29.112 (c)-1, 29.113 (a) (6)-1; Harden Co. v. Commissioner, 165 F. 2d 588 (1948); Regals Realty Co., 127 F. 2d 931 (2nd Cir. 1942).

[26]INT. REV. CODE § 23 (k); U.S. Treas. Reg. 111, §§ 29.22 (a)-13, 29.23 (k)-4, 6; Commissioner v. Hamel, 311 U.S. 504 (1941); Commissioner v. Midland Mutual Life Ins. Co., 300 U.S. 216 (1937); Hadley Falls Trust Co. v. United States, 110 F.2d 887 (1st Cir. 1940).

State Bar Section

LIMITATION OF ACTION—NOTES PAYABLE ON DEMAND

*John H. Fox, Jr.**

In 1929 the defendants simultaneously executed a note payable "on demand after date," a deed of trust securing same, and an agreement. The agreement, to which apparently no reference was made in the note, provided that the debt would be paid in $125 monthly installments and that "as long as these payments of $125 each month are made promptly . . . the party of the second part will not demand payment *in full* of the note of $3500, . . . but same shall be retired and liquidated by monthly payments of $125. . . . In event of *any* default . . . the party of the second part may declare all of her indebtedness at once due and payable upon giving the parties of the first part ten days written notice thereof." (emphasis supplied). In 1949, more than nineteen years after the date of the note, the executor of the payee filed suit and before trial, the "cause of action" was "assigned" in equal shares to two denominational colleges and the Old Ladies Home, none of which is located in the jurisdiction of the trial court. On the original and amended declaration, with the note, deed of trust and agreement as exhibits, the trial court dismissed the suit on a plea of the six year statute of limitations[1] on the face of the pleadings. On appeal, HELD: The cause of action was not barred by the six year statute of limitations since the above quoted provisions of the agreement show that the parties contemplated an actual demand for the payment of the note was necessary to commence the running of the statute. *Belhaven College v. Downing*, 62 So.2d 372 (Miss. 1953).

It is elementary that on a note payable "on demand" the "maturity date" is the day of its execution and the statute of limitations begins to run on that without demand.[2] There is also authority for the rule that on a note payable "on demand after date" the statute begins to run without demand on the next day after its execution.[3] The court in this case is obviously correct in stating that where, however, the payee agrees that the "demand note" shall be paid in monthly installments, so long as they are promptly paid, the full amount of the note "could not be legally demanded on the next day after the execution thereof." The effect of such provisions is to change an ordinary "demand" note from one due on its execution to one payable in fixed monthly installments, with an option to the payee to accelerate the now fixed due dates, in case of default of any monthly installment by giving ten days written notice of his exercise of such option to accelerate the fixed due dates. This would, of course, be true whether such agreement appeared in a separate agree-

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[1]Miss. CODE § 722 (1942).

[2]S. S. Finger Merc. Co. v. Adair, 159 Miss. 303, 131 So. 875 (1931); Minor v. McDowell, 113 So. 576 (Miss. 1927); Shapleigh Hardware Co. v. Spiro, 141 Miss. 38, 106 So. 209, *suggestion of error overruled*, 153 Miss. 81, 118 So. 429 (1925); Butts v. Vicksburg and M. R. R., 63 Miss. 462 (1886). For a collection of cases in other jurisdictions see Note, 44 A.L.R. 397.

[3]S. S. Finger Merc. Co. v. Adair, *supra* note 2. For a collection of cases in other jurisdictions see Note, 44 A.L.R. 397.

ment or on the face of the note. Such an "acceleration" clause is, of course, a very common and almost universal provision of all installment notes.

It is difficult to understand how an "acceleration clause," gives a payee an option to accelerate the fixed due dates of an installment by giving written notice of the exercise of the option in case of default, can be construed as some sort of "elimination clause" eliminating the fixed due dates because of a failure to exercise the option to change the due dates. If the fixed due dates are not changed after default, can this mean that the unchanged fixed due dates will never arrive? The only promise that the payee made was that he would *not* demand payment of the installments *before* the monthly fixed due dates arrived, except in case of default; there was never any promise on his part that *after* they became due he would make demand or give a ridiculous notice that he declared the due dates of already matured installments, accelerated. From the obviously correct premise by the court, that the parties contemplated "that ten days written notice was required *in order for the payee to declare the whole indebtedness due* upon default in the payment of the monthly installments" (emphasis supplied), it is submitted that the court has reached an erroneous conclusion that the parties also contemplated that a demand for payment should be made before suit could be maintained, *after* the whole indebtedness became due. A promise *not to make a demand* before maturity in the absence of partial default, can not be construed as a promise *to make a demand* after maturity and complete default.

The court concedes that (1) if the note alone is considered, or (2) if the note and deed of trust are considered together, or (3) if the agreement is considered separate from the note and deed of trust, then the note would be barred and "the payments of $125 per month . . . are now all barred." The court, however, reaches the conclusion that if you consider all three together a demand is necessary to start the statute running on a debt that once had fixed installment maturities, which maturities have not been changed, although the holder could have done so if he had exercised his option, but that because he promised not to change the maturities without ten days notice after default, the maturities are now so changed that the debt will never become due without a demand which he never promised to make. And this in spite of the fact that the Mississippi Code[4] provides that the parties shall not be allowed to contract away the statute of limitations, and the policy of this state[5] and of all states[6] is against allowing stale claims, especially where a creditor may keep his claim in a state of animated rigor mortis by the simple device of contracting that it shall never mature until he demands payment.

Another anomaly brought into being by the rule of this case is that an acceleration clause which by definition is one that speeds up the due dates of debts, now operates in Mississippi to slow down the due dates on debts, for twenty years or ad infinitum.

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[4]Miss. Code § 724 (1942).
[5]Crane v. French, Adm., 38 Miss. 503 (1860).
[6]Corbin. Contracts § 218 n.67 (1950).

A Mississippi statute[7] also provides that a deed of trust shall be barred when the debt appears of record to be barred. Since it is timorously conjectured that the court in the instant case would a fortiori have reached the same conclusion had the note or deed of trust contained the same provisions as were in "the agreement," then it is submitted that a deed of trust of record which recites an installment note with fixed maturities, but with an acceleration option in case of default and providing for notice of the exercise of such option, would never "appear of record" to be barred and land titles would indeed be precarious.

While the question was not involved in the instant case because the suit was between the eleemosynary assignees of the payee and the makers, yet it is interesting to conjecture what effect this decision will have upon the negotiability of notes containing installment maturities and acceleration clauses. It is elementary that a note, the maturity of which is dependent upon a contingency which may or may not ever occur, is non-negotiable.[8] The Negotiable Instrument Law provides that to be negotiable an instrument must be payable "on demand or at a fixed or determinable future time."[9] In each of these alternatives the maturity is not dependant upon a contingency which may or may not occur, but upon one which is bound to happen, regardless of whether the word "determinable" is construed to mean "ascertainable" or "endable," provided the word "demand" is also given its universally accepted effect of maturing the instrument on the day of its execution. The presence of an optional acceleration clause is generally held not to effect negotiability.[10] However, where a note contains an optional acceleration clause with a provision for a certain number of days notice of the exercise of that option, it would seem to follow from the instant case that in Mississippi a failure to exercise that option would result in a necessity for a demand by the maker to mature that note, which demand would be an event which might or might not ever occur and therefore render it non-negotiable; hence a bona fide purchaser for value without notice and before *eternity* would take subject to all defenses which the maker might have had against the original payee.

It is submitted that even the laudable tendency to be charitable to church and other eleemosynary institutions does not require the liberal construction of the acceleration clauses employed in the instant case.

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[7]MISS. CODE § 875 (1942).
[8]MISS. CODE § 45 (1942).
[9]MISS. CODE §§ 42, 45 (1942).
[10]See Note, 72 A.L.R. 268 (1931).

STENNIS-COLEMAN-BRADY SYSTEM OF JURY SELECTION IN MISSISSIPPI

*Joe N. Pigott**

Since the establishment of the Constitution of the United States, men of the bar and bench have sought to improve and revise the system of selection of juries so that the rights guaranteed by the Constitution might be protected even against the human frailties of those who compose the juries.

The system of selection of juries discussed here first came into prominence in *Smith v. State*,[1] which was appealed from the Circuit Court of Lowndes County, Judge John C. Stennis, presently United States Senator from Mississippi, presiding. Later the system was employed in the Circuit Court over which Judge J. P. Coleman, now Attorney General of the State of Mississippi, presided. The system has been adopted with amendments by Judge Tom P. Brady in the Fourteenth Judicial District of Mississippi. The method, when properly employed, can save many hours of the court's time and many of the taxpayer's dollars. Several times juries in capital cases have been obtained within three hours, whereas several days were often spent under the old system.

Substantially, the system is as follows: The clerk prepares several lists of the venire, one for each attorney and one for the court. The first twenty-four or more names are called and the venire seated in the jury box and in chairs placed in front of the jury box. All members of the venire are sworn and examined by the court as to their qualifications as jurors and then qualified by the court for cause as to that particular case. As each juror is excused his name is stricken from all lists. Then all of the remaining jurors are examined for cause by the State and then by the defendant. The judge and the attorneys then retire from the courtroom where the State may exercise its pre-emptory challenges and the names of those so challenged stricken from the list until the State is satisfied as to the first twelve jurors whose names then remain on the list. The defendant may then exercise his pre-emptory challenges and this procedure is followed until twelve jurors are selected. Each time the defendant is tendered a full panel of twelve jurors' names. The attorneys are usually allowed to go back and re-examine for cause after the regular time has passed before a full panel has been accepted by both sides for any matter which has been newly discovered or overlooked. All parties know the order in which the jurors will be considered and are allowed ample opportunity to confer with their clients.

When a full panel of twelve jurors remains after both State and the defendant have exercised their pre-emptory challenges, the lists are checked to make certain that all agree as to the twelve chosen. The court then, in open court, reads the names of the twelve chosen and announces that the other jurors "will not have to serve on this case." In this way all rights of both parties are preserved, full examination for cause is allowed, and the excused jurors never know who excused them or whether his name was ever reached.

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*Cassidy, McLain & Alford, McComb, Mississippi.

[1]190 Miss. 24, 198 So. 62 (1940).

Often the attorney will have other cases to be tried at the same term of court and before the same jurors who might be acceptable in other cases but, due to reasons not sufficient to excuse for cause, the juror is not desired in that particular case.

The system eliminates time for repetitious examination for cause and works equally well in trying civil cases as well as criminal, and with special and regular venires. Locally referred to as the Stennis-Coleman-Brady System, it guarantees to all the right of trial by a fair and impartial jury with a thought to the conservation of the court's time and the taxpayers' money.

THE VANISHING LITIGANT

*American Bar Association Journal**

Here, in America, we are so accustomed to reading of increases in population and expansions in our cities, factories and public utilities that we take it for granted that growth is the order of the day. It never enters our minds that recession rather than growth may actually be manifesting itself in an important phase of our American life. Least of all, do we, the members of the legal profession, expect tidings that a wizening process is going on in an activity which has always been the outstanding feature of the practice of the law.

Those who have surmised that all activities in America are expanding and who have encountered recent issue of the *Fordham Law Revue* and the *Oregon Law Review*, which show that for more than a quarter century litigation has been declining in volume, must have been dismayed. Both articles, through review of court records, show that the volume of appeals is materially less today than it was thirty years ago. One of the articles, by resort to data which are segregated into the categories of law, equity, crime and divorce, shows that since the biennium, 1927-1928, there have not been filed in the *nisi prius* courts of Oregon as many law, equity and criminal cases as were filed in that biennium. In fact, the article shows that although since 1927-1928 the state has added 600,000 to its population—600,000 potential litigants—the figures for 1927-1928 remain the high-water mark.

Clearly, the litigant's interest in our courts is waning. In fact, he appears to be vanishing.

It is by no means inevitable that adjudication of controversies by adversary action before a tribunal over which a judge presides is here to stay. Our present method of determining the outcome of issues is of comparatively recent origin. For centuries people got along without it. Seeking the judgment of the Supreme Being, the early Anglo-Saxon employed first one and then another of such methods as trial by battle, trial by the ordeals, trial by torture and trial by compurgators. Today we think it atypic that our forebears tolerated such barbarous methods. Possibly future generations may be appalled by what we tolerate. Less than six months ago a group of insurance companies published in New York newspapers an advertisement which is significant. It said: "Personal injury cases today are subject to a delay of three or more years before coming to trial in New York City," and offered all claimants against the companies prompt arbitration. That advertisement shows that toleration is reaching its end and may afford an explanation for the waning volume of litigation. Who can say that 200 years hence men will not wonder why the present generation tolerated the methods which we employ? Even we cannot justify, but, to the contrary, condemn, the heart-rending delay which a seeker of justice must endure in many jurisdictions. Likewise, we are perturbed when we observe with increasing frequency trials that grind on in our *nisi prius* courts for six months and even longer. And who can say that posterity will not be astonished when it reads that some judges of our time held cases under advisement for three years and even more?

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*39 A. B. A. J. 572 (July 1953). Reprinted by permission.

Very likely the litigant is not vanishing. Manifestly, people get involved in controversies as frequently as ever before. It is not possible that the would-be litigant has found a forum in which he can get a decision more promptly at less expense and with greater certainty than in the courts? It may be that it is the present method of judicial trial, or at least its employment in some categories of controversy, which is beginning to vanish.

NOTES

DECISIONS OF THE MISSISSIPPI SUPREME COURT FOR THE 1952-53 TERM

INTRODUCTION

This work is an attempt to condense into one article the majority of the decisions handed down by the Mississippi Supreme Court in its most recent session in the hope that the attorney may find it useful in his research. The court handled a large number of cases in the past session, several of first impression. The scope of this article is necessarily limited and some cases which were only restatements of well-settled principles of the law are not commented upon.

I

CONTRACTS

TENDER. It was held in *Lauchly v. Shurley*,[1] a suit for specific performance, that where it is evident that a party will refuse a tender of money it is not necessary to go through an idle ceremony of making the tender. Tender at the time of trial is sufficient.

CONDITIONAL SALES CONTRACT. In *Furches Motor Co. v. Anderson*[2] it was alleged that the repossession of an automobile was wrongful or constituted conversion because of a misdescription in the conditional sales contract. The court held that "although a mistake in a serial number of an article or one of its parts may nullify a description where the number is the only method of distinguishing between articles of the same type, it is generally held that a mistake in the serial number will not vitiate the description, if there are other facts given in the description by which the property can be identified."

CONSIDERATION. Where the parties to a bilateral contract mutually agreed, before a breach thereof, to abrogate and discharge it and to substitute in its stead a new contract conferring advantages or imposing new burdens on both, it was held in *Producers' Gin Association v. Beck*[3] that the mutual obligations or advantages constituted sufficient consideration.

OPEN ACCOUNT. The case of *Anderson v. Lancaster*[4] involved a suit on open account for professional services rendered by a doctor. The defendant pleaded the three year statute of limitations. It was claimed by the physician that he had an agreement with the defendant to the effect that payment to him be deferred until the hospital bill was paid. The court held that there is no legal obstacle to such an agreement and further that the cause of action did not accrue until payment to the hospital. The agreement was held not to have violated Section 724 of the Mississippi Code of 1942 which prohibits changing of the period of the statute of limitations because this did not change the period but only provided the due date of the obligation.

BUILDERS' CONTRACT. The court was concerned with an architect's

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[1] 64 So. 2d 898 (Miss. 1953).
[2] 61 So. 2d 674 (Miss. 1952).
[3] 60 So. 2d 642 (Miss. 1952).
[4] 60 So. 2d 595 (Miss. 1952).

certificate in *Oden Construction Company v. Helton*.[5] In discussing such a certificate the court said, "in order to terminate a contract, an architect's certificate must expressly certify that the owner is warranted in taking over the premises and materials for the purpose of completing the building." Here the subcontractor had failed to perform his contract and the contractor had taken over. Under these circumstances, it was held that the necessity for notice may be waived by virtue of the builder's completely abandoning the work or if defective work is discovered after completion, and when such is the case, the architect's certificate that the builder is not complying with his contract is not required.

SALES. Where one party agrees to purchase a business and is given a memorandum by the seller stating the amount of accounts payable and it is later disclosed that the memorandum misrepresents the true facts, it has been held in *Rhyne v. Gammil*[6] that the representation need not be deliberate or willful; it is enough that it be made with inexcusable disregard of its accuracy, where all the facts are in the possession of the person making the representation, he may not shift the burden of verification upon one whom he knows is acting upon his representation. The representation must be the inducing cause of the sale and must result in a loss.

In *Carter Company v. Farley Clothing Company*[7] a manufacturer sent a shipment of shoes to a retailer who had not ordered them. The retailer elected to keep a portion of the shipment and return the rest. The manufacturer sued upon the open account for the entire order. In holding that the defendant was liable for the whole shipment, the court reasoned that, since the shipment was unauthorized, it amounted to an offer to sell and had to be accepted or rejected in toto. It was, therefore, held that the acceptance of only a part constituted an acceptance of the whole shipment.

II

COMMERCIAL LAW

INSURANCE. A purchaser of insured property is entitled to rely on an agent's assertion that the policy will be changed to his name; if the statute giving an agent general power to bind his company is applicable only to application and adjustment, then this purchaser stands as an original applicant, and the company is estopped to deny liability when the purchaser relied on the agent's assertion that the policy would be changed.[8]

An insurance policy containing the term "from accidental injury" was construed in *Byrd v. Reserve Life Ins. Co.*[9] to cover an injury which occurs where the injured party was doing the work he intended to do but the result was not intended or expected.

SURETYSHIP. Defendants were sureties on a bond in the amount of five hundred dollars, and a third party increased the amount to one

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[5]65 So. 2d 442 (Miss. 1953).
[6]60 So. 2d 500 (Miss. 1952).
[7]62 So. 2d 305 (Miss. 1953).
[8]Camden Fire Ins. Asso. v. Koch, 63 So. 2d 103 (Miss. 1953).
[9]65 So. 2d 249 (Miss. 1953).

thousand dollars, the amount actually required. On forfeiture, the sureties denied liability completely, saying there was a material alteration which made the instrument void. The court pointed out that this change by a third party is known as spoliation, and that the presently accepted rule is that such mutilation by one not a party to the instrument does not change its legal operation, so long as the original writing remains legible; the obligation remains as to the original amount of five hundred dollars.[10]

AGENCY. When a cafe manager relied on the honesty of the agent of the defendant company to leave and charge for the correct amount of bread, the principal was responsible for the tort of the agent in padding the account to the injury of the cafe owner.[11]

In an action for negligence against a company and its driver of a company car, even though the driver carried with him some papers to mail for the master, his trips carrying the plaintiff to supper and a night spot were said to be ventures of his own. Upon their way home by the "Back Road," the plaintiff was injured by the negligence of the driver; in such case no liability attached to the master. *International Shoe Company v. Harrison.*[12]

In another instance, after examining testimony of two witnesses that a servant had a bad reputation for drinking, of two others that he had a good reputation for sobriety, and testimony that the master himself knew that the servant did drink after hours, the court thought the defendant-master was entitled to a peremptory instruction on a count of negligently entrusting a car to a known incompetent driver.[13] The majority's position here was the knowledge of incompetency may not be proved by reputation; the servant must in fact be incompetent and that fact known by the master. The evidence showed, said the majority, that the servant may have had a reputation merely for drinking, which was the only reputation the master knew. It was the minority's view that a reasonable inference from a bad reputation for drinking would be that the servant was an incompetent driver and that from said reputation the master could know of the incompetency.

In the case of *Schill v. Gipson*[14] one Redden had delivered certain goods to the defendants in settlement of a debt owed to them by Slidell Lumber Company, of which the plaintiff was the president. The goods so delivered had been advertised for sale in the newspaper by "A. L. Redden, Mgr. and Salesman." The court held that whether the plaintiff, Schill, owned the property individually or whether it belonged to the lumber company, there was sufficient evidence for the jury to find that Redden was the agent of the plaintiff with authority to deliver the property in settlement of the indebtedness. Plaintiff's acquiescence in the advertisement for sale is such proof of the agency relationship.

PARTNERSHIP. Where credit was extended to a partnership, the individuals remained liable even though the business was taken over by a corporation. Those who had former dealings with the partnership

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[10]Francis v. Hughes, 64 So. 2d 351 (Miss. 1953).
[11]Billups Petroleum Co. v. Hardin's Bakery Corp., 64 So. 2d 764 (Miss. 1953).
[12]63 So. 2d 837 (Miss. 1953).
[13]Lovett Motor Co. v. Walley, 64 So. 2d 370 (Miss. 1953).
[14]60 So. 2d 593 (Miss. 1952).

should have been given actual notice of the dissolution, "or its equivalent."[15]

An order was given for certain materials by one of the partners in a business without the knowledge of the other in *Picone v. Commercial Paste Company*.[16] Two weeks thereafter the parties signed a limited partnership agreement and had the same recorded in the office of the chancery clerk of Hinds county. The partner without knowledge of the purchase denied liability for the payment thereof because of the recorded agreement. In disposing of this contention, the court held that the recordation did not relieve the partner of liability. The rights of the seller must be determined by the circumstances confronting it at the time of the sale.

In *Credit Industrial Company v. Adams County Lumber & Supply Company*,[17] where a trade acceptance had been accepted by a partnership before one of the partners withdrew from the firm, the court held it was error not to hold him liable on the instrument for the reason that the agreement between the withdrawing member of a partnership and the remaining partners does not relieve the withdrawing member from liability to firm creditors for debts existing at the time of his withdrawal unless there is assent by the creditors.

Negotiable Instruments. In the *Credit Industrial* case just discussed, the plaintiffs obtained the trade acceptance from the drawer who had drawn them upon the defendant company; they claimed to be bona fide holders for value and to have paid good consideration. The defendants denied liability upon the ground that there had been false representations by the drawer in procuring the said instruments. The court held that any testimony to show the terms of the agreement between the defendants and the drawer should be excluded on the grounds that such was an offer to vary and add terms to written agreements. In its discussion the court said that any fraudulent representations upon which a party may predicate any demand for relief must relate to past or presently existing facts and cannot consist of promises, except in some cases when a contractual promise is made with a present undisclosed intention of not performing it. It was said further that the proof of the promises would not have exonerated the defendants from liability on the written instruments as every holder is deemed prima facie to be a holder in due course subject to the limitation that if the negotiator's title was defective, the holder must prove that he, or his predecessor in title, acquired the title in due course.

The defendants in *Belhaven College v. Downing*[18] executed a demand note, a deed of trust, and an agreement in 1929 concerning the purchase of land. In 1949 action was brought on behalf of the payee. In answer to a plea of the statute of limitations, the court held that since the agreement executed simultaneously with the note expressed the intention that an actual demand should be made, then the statute would not begin to run until such actual demand.

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[15]Guynn v. Broadum, 63 So. 2d 821 (Miss. 1953).
[16]60 So. 2d 590 (Miss. 1952).
[17]60 So. 2d 790 (Miss. 1952).
[18]62 So. 2d 372 (Miss. 1953).

BANKRUPTCY. The court had before it the problem of whether or not a preference had been given in the case of *Carroll Notion Company v. Neville, Trustee.*[19] In disposing of the issue the court held that in an attempt to recover money on the theory that its payment constituted a preference, the trustee must show that the payments enabled such creditors to obtain a larger percentage of their claims than was received by other creditors of the same class. The failure to meet this burden prevents recovery. The trustee must further show that there was reasonable cause on the part of the creditor to believe the debtor to be insolvent. Mere inability to meet current obligations is not insolvency in the bankruptcy sense, which means an excess of liabilities over assets at a fair valuation.

USURY. The case of *Bell v. Tindall*[20] presented the following factual situation: Tindall provided money for Bell to purchase some land. In return Bell gave him certain notes. It was charged by Bell that Tindall was getting more than eight per cent interest. The defense was that there was not a loan but rather a purchase of the notes at a discount. Tindall had advanced to Bell $4500 and in return the notes were to aggregate a principal of $5250 and also bear six per cent interest. The notes were made payable to bearer and the transaction was handled by a lawyer. The court said that it will look through the form to the substance of the transaction to determine whether usury has been charged or collected. The deed of trust on the property to secure the money's repayment designated Tindall as the payee of the notes. The notes were never owned by anyone other than Tindall. He was the original and the only payee. Tindall never discounted the notes held by some person other than the maker. As a matter of reason, he knew that the money was to be used in closing the deal for the purchase of the property. The papers, with him as original payee, were delivered to him, they were kept by him and paid by the maker as the notes became due, and as they were paid, he delivered them to the maker. In the language of the court "if a note is offered for discount by the maker, it is plainly usurious, as between him and the party to whom it is delivered, if the discount from its face value is greater than the rate of interest allowed as a loan." By his act Tindall forfeited all the interest.

TAXATION. In the case of *Edwards House Company v. Stone*[21] the court said that where a hotel is furnishing lodging to recruits and applicants for enlistment in the army and air force this does not constitute a sale of tangible property nor a charge for labor to the government so as to exempt the hotel from state sales tax. MISS. CODE § 10,113 (1942) exempts from general sales tax so much of the gross income as is derived from either such sale or labor to or for the government.

The gasoline tax apportionment statute reads "that the total allocated to any one county shall not exceed the sum of $190,000." The court has construed this limitation to be applicable for successive one year periods in order to give effect to the legislative intent and to make the act sensible and workable.[22]

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[19]65 So. 2d 140 (Miss. 1953).
[20]60 So. 2d 801 (Miss. 1953).
[21]61 So. 2d 663 (Miss. 1952).
[22]McCullen v. State *ex rel* Alexander, 63 So. 2d 856 (Miss. 1953).

A taxpayer who lived in Texas, a community property state, bought oil producing land in Mississippi in his own name, but the funds belonged partly to his wife. Thus there was a resulting trust in her favor for one half of the land; they took advantage of this division and filed a joint tax return in a lower bracket. The tax commissioner contended that the land in the taxpayer's name was his solely and entirely, so the income was his only. The court reasoned that although the law of property is determined ordinarily by the situs, a division between the husband and his wife would not be a transposition of community property concept into this state, for her one-half interest arises via the resulting trust. Such a trust in land is not void under Section 269 of the Mississippi Code requiring such to be in writing and recorded; the statute does not apply to constructive and resulting trusts.[23]

LIENS. The case of *Willis Hardware Company v. Clark*[24] involved Section 1555, Mississippi Code of 1942, which is: "a judgment so enrolled shall be a lien upon and bind all the property of the debtor within the county where so enrolled, from the rendition thereof." The decision in the case was to the effect that an enrolled judgment is a general lien on the property of the judgment debtor subject to levy and sale but does not attach until the judgment creditor takes the property in execution. Where the judgment creditor has allowed the judgment debtor to convey certain cotton to a third party after the judgment was enrolled, and the third party has sold the cotton, he may not recover a money judgment against the third party for conversion of the cotton against which no specific lien had been impressed. There was a dissenting opinion in this case which asserted that the majority result made the statute ineffective.

III

PUBLIC LAW

MUNICIPAL ASSESSMENT. The case of *Estate of McCardle v. City of Jackson*[25] involved the assessment of property in the city of Jackson. MISS. CODE § 9769 (1942) reads: "any other circumstances that tend to enhance" the property's value shall be considered in making the assessment; conditions, surrounds, improvements, and capabilities may be considered. In regard to opinions as to proper value the court said that intricate details of proper valuation of property and specialized knowledge as to geographic, economic, and social facts and their significance to value have warranted the courts in recognizing the use of expert testimony for valuation of real property, for consideration by the jury along with all other evidence in the case. MISS. CODE § 9746 (1942) provides that every lawfully assessed ad valorem tax is a debt due by the person owning the property, "and in all actions for the recovery of ad valorem taxes the assessment roll shall be prima facie correct." The burden of proof to overturn the assessment by a preponderance of the evidence is upon the taxpayer.

ZONING. An act of the city in zoning certain property was attacked in *Holcomb v. City of Clarksdale*.[26] It was stated by the court that one assailing the validity of a zoning ordinance has the burden of proof to

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[23]Stone v. Sample, 62 So. 2d 307 (Miss. 1953).
[24]61 So. 2d 441 (Miss. 1952).
[25]61 So. 2d 400 (Miss. 1952).
[26]65 So. 2d 281 (Miss. 1953).

establish that: (1) the ordinance is invalid, unreasonable or arbitrary with respect to his property; (2) there is no permissable interpretation which justified its adoption as a reasonable exercise of the police power of the state; or (3) the ordinance will not promote the safety, order, convenience, prosperity, and general welfare of the public. In the absence of proof to the contrary, there is no duty on the municipality to sustain the reasonableness of the ordinance by proof that it is necessary or desirable. A person seeking a change in an ordinance has the burden of proving a public need for the amendment in question.

CITY ORDINANCE. It is not necessary for the city to introduce a certified copy of a city ordinance which makes criminal offenses against the city of all offenses which are misdemeanors under the penal law of Mississippi. MISS. CODE SUPP. §§ 3374-78 (1950) changed that requirement and provided that all offenses "under the penal laws of this State which are misdemeanors are hereby made, without further action of the municipal authorities, criminal offenses against the city . . . " This point was decided in *Sykes v. City of Crystal Springs*.[27]

CONTRACTS. The powers of a municipality are wholly statutory. There is nothing in Miss. Laws 1950, c. 494, or in Miss. Laws 1946, c. 325, that authorizes a municipality to employ an agent to sell its bonds, or to delegate to a group of investment bankers or a group experienced in the securities business generally, and in the field of revenue bonds especially, the power to procure for the municipality necessary legal and engineering services required in connection with the construction of public utility improvements and to pay a fee therefor. *Love v. Town of Carthage*.[28]

CONSTITUTIONAL LAW. The city of Brookhaven undertook to extend its corporate limits under the authority of Miss. Laws 1950, c. 491. The ordinance was attacked in the case of In re *Extension Boundaries Brookhaven*,[29] on the grounds that Chapter 491 is unconstitutional because it attempts to confer legislative authority upon the judiciary in violation of MISS. CONST. ART. I, §§ 1, 2. The court held that the act allows the court to determine only the reasonableness of the proposed action; this is not an unconstitutional delegation of legislative power but is properly a function of the judiciary. The court may reduce the enlargement only and has no power to annex territory to an existing municipality.

POWER TO CLOSE STREETS. In *Puyper v. Pure Oil Company*[30] the court said that MISS. CODE § 3419 (1942) vests in a municipal corporation full power and authority to close or vacate any street or alley if due compensation be made to abutting landowners for all damages sustained thereby. The general rule is that only those persons with property abutting on the street have the right to compensation. Others only need reasonable access to the general system of streets. Otherwise, the latter class must show special damages, differing in kind, not merely in degree, from those sustained by the general public. It is not necessary that the ordinance contain a formal declaration that public interest or convenience required that the street be closed. The adoption of the ordi-

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[27] 61 So. 2d 387 (Miss. 1952).
[28] 65 So. 2d 568 (Miss. 1953).
[29] 65 So. 2d 832 (Miss. 1953).
[30] 60 So. 2d 569 (Miss. 1952).

nance is itself a determination that public interest and welfare require that the street be closed.

Public Utilities. In *Womack v. Peoples Water Service Company*[31] a water company had cut off the water supply for failure of the plaintiff to pay his bill under increased rates. The court held that in order for the plaintiff to recover damages he must show not merely good faith in his refusal to pay the service charges demanded, but also reasonable grounds for disputing the claim.

Counties. When a board of supervisors attempts to assert as an affirmative defense that the county has exceeded its budget, such excession must be shown to exist at the time the work supporting the claim was done, as distinct from an excession of the budget when the account is submitted.[32]

Bernard v. Supervisors of Jackson County[33] decides that the cutting of timber naturally grown since the beginning of a ninety-nine-year lease upon sixteen section land is waste, and that an injunction may issue preventing the injury of the "inheritance." This is an application of ordinary landlord-tenant law to these public lands. The decision, six judges participating, has a dissent which thinks the majority view will bring about unprofitable results, the idea being that timber grown after the beginning of the lease might be likened to and considered as a crop; since much of the land is suitable for little else, this analogy to crops would allow profitable leases from the viewpoint of both lessee and lessor.

Land owned by the county and used as a penal farm is not subject to the payment of district drainage taxes. Miss. Code § 4627 (1942), Miss. Laws 1946, c. 234, and Miss. Code Supp. § 9697 (1942) exempt from taxation all property, real or personal, belonging to any county. The same sections exempt from taxation property belonging to any college or institution for education of youth, not exceeding 640 acres of land. These issues were settled in *Sunflower County v. Moorhead Drainage District*.[34]

The State. A devise to state institutions for the blind called for a construction of the Mortmain statute prohibiting the giving of over one-third of an estate to "charitable, religious, educational, or civil institutions" to the exclusion of a child. The court held that the prohibition applied to state owned as well as to privately owned institutions. However, the entire gift would not be void, one third being allowed to go to the institution.[35]

Although under Miss. Code § 8846 (1942) a physician may practice optometry under his physician's license, when he practices the same as an employee, paid a salary by one who is not so licensed, he is subject to injunction for the unlawful practice of optometry.[36]

Elections. After twenty per cent of voters petitioned for election

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[31]61 So. 2d 785 (Miss. 1952).
[32]Carroll County v. Shook, 62 So. 2d 311 (Miss. 1953).
[33]62 So. 2d 576 (Miss. 1935).
[34]62 So. 2d 214 (Miss. 1953).
[35]Mississippi School for the Blind v. Armstrong, 62 So. 2d 369 (Miss. 1953).
[36]Bush Jewelry Co. v. State Board of Optometry, 62 So. 2d 770 (Miss. 1953).

prior to bond issue but before the board of supervisors proceeded to sell the bonds, some of the petitioners withdrew their names reducing the number below the minimum required. In such an instance no election is needed; the petition is said to be effective as it exists at the meeting when its subject is adjudicated, not the date when filed.[37]

When the law requires that thirty days notice of an election be given by newspaper publication, the first publication must be made at least thirty days prior to the election and the publication must be continued in each successive weekly issue of the newspaper until the date of election. Not more than seven days should be allowed to intervene between the last publication of notice and the election.[38]

IV

REAL PROPERTY

Vendor and Purchaser. One who purchases land in good faith, for a valuable consideration, without actual or constructive notice of equitable claims of others, acquires a perfect title from his vendor, who previously purchased the same at a valid foreclosure sale. *Blackwell v. Hunt Oil Company*.[39] In the same opinion the court held that one who purchases property that is involved in pending litigation stands in the same position as his vendor, whether he purchased for valuable consideration or not, and takes it subject to any judgment or decree that may be rendered. Where the suit on which the lis pendens notice was given is dismissed, rights which were acquired before the dismissal are not affected.

Mortgages. Mississippi recognizes equitable foreclosure by agreement between mortagor and mortgagee without formal sale when the value of the mortgaged property is distinctly less than the debt; there is no disadvantage to the junior mortgagee because there is nothing left over to which the equity of redemption could attach as being of any value.[40]

In *Laird v. Bethea*[41] the question was this: Does an assignee-beneficiary of a deed of trust have the power to substitute a trustee where the deed of trust provides that substitution can be made by the named, original beneficiary, or "his legal representative"? In answering this question, the court said that "legal representative" in a deed of trust as expressive of the power to substitute a trustee, does not include an assignee or grantee but is relatively narrow in meaning. There can be no right in a party to appoint a substitute trustee except by express provision of the deed of trust, in the absence of which no one but the court can make the appointment.

Trusts. In *Williams v. Henz*[42] the court held that where one seeks to establish that another who purchased property was holding it on resulting trust "it is absolutely indispensable that the payment should be actually made by the beneficiary or that an absolute obligation to pay

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[37]Coleman v. Thompson, 63 So. 2d 533 (Miss. 1953); *suggestion of error overruled* 63 So. 2d 832 (Miss. 1953).
[38]Neal v. Board of Supervisors of Carroll County, 63 So. 2d 540 (Miss. 1953).
[39]64 So. 2d 901 (Miss. 1953).
[40]Moses v. Ehrlich, 64 So. 2d 352 (Miss. 1953).
[41]60 So. 2d 526 (Miss. 1952).
[42]62 So. 2d 212 (Miss. 1953).

should be incurred by him as a part of the original transaction of purchase at or before the time of conveyance. No subsequent and entirely independent conduct, intervention, or payment on his part would raise any resulting trust."

TAX TITLES. In *DeLee v. Anderson*,[43] a suit to confirm title and cancel a cloud, it was necessary for the complainant to uphold the validity of his title based on a tax deed. The description "77 acres north part Section 48 Twp 1, Range 3" on the tax deed was held sufficient to locate the land, it being a specific number of acres capable of location by survey on the northern portion of the section.

MISS. CODE § 9775 (1942) admits parol testimony to apply to a description of land on the assessment roll, or in a conveyance for taxes, where such testimony will show that land was assessed and sold, and there is enough in the description on the roll or conveyance to be applied to a particular tract of land with the aid of such testimony. Such was the holding in *Meek v. The Farmers' Cooperative*.[44] And in *Stockstill v. Bennett*[45] the court said that where the description of land in tax assessment rolls contains a patent ambiguity and it is sufficient to be applied to the correctly described tract of land by the aid of extrinsic evidence based upon clues furnished in the assessment, the tax sale and the deed will not be cancelled on the grounds that the descriptions used were void.

ADVERSE POSSESSION. A grantor conveyed to his son twenty-three acres of land; through mesne conveyances it came into the hands of Mrs. Walker. The grantor never surrendered possession of the land but continued to cultivate it. The grantor was notified that the government still owned the land, whereupon his daughter applied for a patent, obtained it and deeded the land to her father. Mrs. Walker made no demand for possession or payment of rent, nor has she paid taxes thereon for twenty-five years. For fifteen years since the government patent she failed to attempt to gain possession. Under these circumstances, the court held that the grantor's adverse possession may be initiated by the retention of the actual possession and exercise of dominion over the property consistent only with a claim of exclusive and adverse right.[46]

DEEDS. A deed must be read in the light of the circumstances at the time of its execution; construction should be on the entire instrument and each word and clause given meaning; the main document and that to which it refers must be construed together; if the wording is ambiguous, the practical construction placed thereon by the parties will have much weight in determining the meaning; if ambiguous, the meaning more favorable to the grantee will be adopted.[47]

The case of *Martin v. Adams*[48] seems to be a typical question of the delivery and acceptance of a deed. The husband attempted to convey a life estate to his wife and had the deed recorded but returned to his possession. She refused to accept the conveyance, and the deed remained

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[43]63 So. 2d 393 (Miss. 1953).
[44]61 So. 2d 778 (Miss. 1953).
[45]61 So. 2d 154 (Miss. 1952).
[46]Walker v. Easterling, 61 So. 2d 163 (Miss. 1952).
[47]McCuiston v. Blaylock, 61 So. 2d 332 (Miss. 1952).
[48]62 So. 2d 328 (Miss. 1953).

in the husband's possession except when the wife took the instrument to an attorney for interpretation. It is clear that her possession under these circumstances does not evince either acceptance or delivery.

Reformation of Instruments. The case of *Crawford v. Brown*[49] presented a deed which incorrectly described certain property. There had been three subsequent conveyances of the property in question. The original grantor brought a bill to cancel cloud on his title of the third grantee on the ground that both the second and third grantees should have had notices of the mistake. In upholding complainant's title and cancelling the cloud caused by the grantee's claim, the court said that when a person is materially interested in a fact and has knowledge of such facts as to excite attention of a reasonably prudent man and to put him upon guard and thus excite him to inquiry, he is chargeable with notice, equivalent in law to knowledge, of all those further relevant facts which such inquiry, if pursued with reasonable diligence, would have disclosed.

Oil and Gas. Chapter 220, Laws of 1950, authorize the state Oil and Gas Board, when two or more separately owned tracts of land are embraced within an established drilling unit and the owners have not agreed to integrate their interests, to require such owners to integrate their interests and to develop their drilling unit for the prevention of waste and to avoid the drilling of unnecessary wells. Miss. Laws 1948, c. 256,§9 (d), provides that apportionment shall be made on the basis of, and in proportion to, the acreage content of the drilling units prescribed for the producing horizons for the pool. *Humble Oil Company v. Welborn.*[50] And in *Griffith v. Gulf Company*[51] where there was a well in production on a 160 acre plot of a 250 acre parcel of land, the court required the owners of the 160 acres to share the royalties with the owner of the 90 acres on the grounds that the 90 acres were being drained and, under the spacing regulations of the Oil and Gas Board, the owner of the 90 acres was barred from drilling upon his own property.

The court was called upon to settle a question involving land leased for minerals in *Texas Gulf Company v. Griffith.*[52] It held that where a drilling unit incorporates only a part of leased land, the primary term of the lease is extended only to that part within the unit and not to that part without the unit. To hold otherwise would be to apply our conservation laws in violation of the constitutional guaranty that no person shall be deprived of his property without due process of law. Otherwise the production from the unit could keep the lease in force indefinitely as to the leased land without the unit and the lessor would be deprived of the right to drill on this land, and deprived of any royalties, rentals or benefits therefrom.

An action in ejectment was brought by a mineral lessee in *Sistrunk v. Graham*[53] and there was a controversy as to his right to maintain such suit. The court upheld his right saying, "An oil, gas and mineral lessee,

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[49] 61 So. 2d 344 (Miss. 1952).
[50] 62 So. 2d 211 (Miss. 1953).
[51] 61 So. 2d 306 (Miss. 1952).
[52] 65 So. 2d 447 (Miss. 1953).
[53] 61 So. 2d 335 (Miss. 1952).

certainly in a state adopting the ownership-in-place theory, has a present possessory interest in the surface lands which will support an action of ejectment to the extent of those interests." The lessor is not a necessary party to such suit. The lessee's interest is superior. In this particular case, the lessor was the United States Government, which is immune to suit. The necessary party rule would not apply in such a situation, for to do so would deprive the lessee of any remedy.

Mississippi adopts the general rule that where there has been a severance of minerals by an adverse possessor, the continued adverse possession of the surface by the severor or severee inures to the benefit of the severed mineral estate as against the true owner. This is true whether the adverse possessor conveys the surface and reserves the minerals, or keeps the surface and conveys the minerals.[54]

In a suit to cancel a mineral lease for failure of production and to recover the value of the gas drained by a well on adjacent land with which complainant's land had been unitized by the lessee, the Supreme Court held that the pooling of leases into a gas production unit, for conservation purposes, also had had the effect of pooling the mineral interests of the royalty owners, and that production from the unit well had had the effect of extending the primary term of all the leases pooled.[55]

V

CRIMINAL LAW

Self-Defense. Self-defense was pleaded to a charge of manslaughter in *Boatman v. State*.[56] The defendant was not called as a witness. The court held that where the defendant did not testify, neither the jury nor the court may attribute a defense or justification upon which he does not rest. There were no eyewitnesses to testify as to the issue of self-defense.

Deadly Weapon. Miss. Code § 2011 (1942) defines firearms only as deadly weapons. When the accused was charged with assault and battery with a deadly weapon consisting of an iron pipe, the court said the question of whether such pipe constituted a deadly weapon was a question for the jury.[57]

Robbery. In *Jones v. State*[58] the defendant was engaged in gambling with several other persons and afterwards, by threat with a pistol, he took not only the money he had lost, but other money which belonged to the persons with whom he had gambled. The court held this was robbery.

False Pretenses. In *Blakeney v. State*[59] Mississippi aligns with the majority view in holding that giving a bad check which "accused has no reason to suppose will be honored, is a false pretense, even though no verbal misrepresentation is made as to the instrument, the giving of such check or draft being itself a representation, symbol or token that the accused has money or credit with the drawee to the amount of its face

54Carlisle v. Federal Land Bank, 64 So. 2d 142 (Miss. 1953).
55Superior Oil Co. v. Beery, 63 So. 2d 115 (Miss. 1953).
5661 So. 2d 784 (Miss. 1953).
57Batteast v. State, 60 So. 2d 814 (Miss. 1952).
5862 So. 2d 217 (Miss. 1953).
5962 So. 2d 313 (Miss. 1953).

value." The indictment could either be brought under false pretenses,[60] which is expected from the two year statute of limitations, or the so-called "bad check" statute.[61]

In another false pretenses case,[62] the indictment and proof did not allege and show any detriment to the merchant who cashed a check endorsed in blank for one other than the purported endorser; the conviction was reversed. The check had been secured in some manner not shown from a service station owner who cashed it for its endorser-payee; the prosecuting witness received his money from the bank in due course and the loss evidently fell upon the service station owner who cashed the check originally for the rightful payee.

LARCENY. The appellant, in *Wilkinson v. State*,[63] went with one Whittington to the farm of another who was holding three cows as estrays. Whittington found the cows were not his, but the appellant urged him to go ahead and claim them anyway. The cows were sold and the appellant received $85 of the sale price. He was tried under MISS. CODE § 2240 (1942), the grand larceny act. It was the appellant's contention that he should have been tried under Section 2146 dealing with receiving property by falsely impersonating another to receive property or money intended to be delivered to the person impersonated. The court disposed of the point by saying it was not raised in the court below and therefore was considered to be waived. It went on to discuss the two statutes in question to the effect that the test between the two acts is the intention with which the owner parts possession. If the possession is obtained by fraud and the owner intends to part with the title as well as possession, the crime is that of obtaining property by false pretenses. If it is shown that the possession is fraudulently obtained with a present intent on the part of the person obtaining it to convert the property to his own use, and the owner intends to part with possession merely and not with the title, the offense is larceny.

BURGLARY. An instruction given to the jury that they might find the defendant guilty of burglary "even though you believe the defendant, Leon Holderfield, had permission to enter the building" was error because, the court said, there can be no burglary if the accused had consent of the owner of the building to enter. The fact that one enters with the consent of the owner and then commits larceny does not make him guilty of burglary.[64]

DUE PROCESS. It is not a denial of due process of law for a judge not to appoint a defense attorney in a non-capital felony case. It was so held in *Phenix v. State*.[65] In this case the defendant asked for no attorney, he had had advice from a friend during the trial, he had questioned witnesses, he was aided by the judge in ascertaining his rights, and the judge wrote his instructions. Neither the constitution, statutes, nor decisions of Mississippi or the United States require or authorize a trial judge to appoint an attorney in such a case.

60*Miss. Code* § 2149 (1942).
61*Miss. Code* § 2153 (1942).
62Bruce v. State, 64 So. 2d 332 (Miss. 1953).
6360 So. 2d 786 (Miss. 1952).
64Holderfield v. State, 61 So. 2d 385 (Miss. 1952).
6561 So. 2d 392 (Miss. 1952).

The defendant in *Jones v. State*[66] demurred to the indictment on the grounds of vagueness and an insufficient description of the property stolen. Such property consisted of a certain amount of fertilizer which the indictment described as "six sacks of ammonium nitrate." The court held that "ammonium nitrate" has a well defined meaning as given in Webster's dictionary as a common ingredient or fertilizer. Dictionary definitions are intended to give the usual or prevailing meaning of words; thus, the description was not vague. The court further held that there was no error in allowing the state to amend the indictment under MISS. CODE § 2532 (1942), because where the amendment does not vary the description but merely supplements it and the original indictment was probably sufficient, the amendment does not constitute a new case which would prevent the defendant from understanding the offense with which he is charged. In this case the value of the goods was only $21 and the court said the defendant was wrongly sentenced to the penitentiary under MISS. CODE § 2249 (1942), but rather he should have been sentenced under Section 2538 which provides punishment for receiving stolen goods of value less than $25.

On the subject of a variance between the wording of the indictment and the proof, it was held in *Cook v. State*[67] that where the indictment charges theft of a "cow" there is no variance with proof which shows that the animal was a "heifer," as the term "cow" is generally understood to include "heifers."

MISS. CODE § 2010 (1942), which makes the burning of any building or personalty with intent to defraud an insurance company a felony, does not call such crime "arson"; therefore, the indictment need not aver that the burning was done "wilfully and maliciously." Neither need there be a *valid* insurance policy held by the felon; there need be only the *intent* to defraud the insurance company.[68]

An indictment charging "possession" of beer "for the unlawful purpose of sale," but not said to be over four per cent alcohol, charges no crime. Neither possession nor taking into a non-beer county for personal consumption is a crime; only "transportation, storage, sale, distribution receipt and/or manufacture" of such beverage shall not be permitted after an election.[69]

DICTA. The following case is inserted here for the interesting attitude on the part of the court as to cattle "rustlers." The language of the court in *Mapp v. State*[70] was as follows: "It sometimes occurs that when there is a local crusade for law enforcement in regard to cattle stealing, the prosecution has gone a long way toward obtaining a conviction when an indictment is returned and the corpus delicti is established, but this is perhaps as it should be so long as such an attitude does not transcend the proper bounds." Query: what are the proper bounds?

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[66]60 So. 2d 805 (Miss. 1952).
[67]65 So. 2d 277 (Miss. 1953).
[68]Brower v. State, 64 So. 2d 576 (Miss. 1953).
[69]Hoyle v. State, 62 So. 2d 380 (Miss. 1953).
[70]65 So. 2d 257 (Miss. 1953).

VI

DOMESTIC RELATIONS

MARRIAGE. In *Minor v. Higdon*[71] the court was asked to decide who was entitled to the estate of a deceased who left two wives. His first wife had remarried without a divorce. The court said that a wife who enters into a bigamous second marriage during the lifetime of her husband, even though she has knowledge he has remarried and assumes he obtained a divorce, will be estopped from asserting a right in the estate of the first spouse. The court will presume the marriage of the husband and his second wife is valid; it was solemnized according to law and its invalidity must be established by clear and certain testimony offered by a party having the legal right to test its validity. The first wife was estopped from challenging the validity by her own conduct and the second wife is entitled to the estate.

DIVORCE. In deciding what constitutes cruel and inhuman treatment, the court in *Sandifer v. Sandifer*[72] said that a long period of continuing abusive language, unsociability and several threats of physical violence, nagging, slander, one threat to shoot with a pistol and numerous threats to poison food, are sufficient to constitute such treatment even though there has been no actual physical violence.

In *Gates v. Gates*[73] the wife sought to have an adjudication of her interest in the home and to have the court decree a lien upon the property of the husband to secure the payment of alimony. The homestead was acquired by joint efforts of both the husband and wife. The husband contended that the lien upon his property was to secure monthly payment of alimony to become due in the future. On appeal, it was held that the alimony was presently due and that the lien was effective to secure payment of the installments as they became due. The court further held that there was no question involved as to the application of a lien to installments not in default.

A husband's refusal to allow his wife's mother to come to live in their marital home permanently is not constructive desertion.[74]

ADOPTION AND CUSTODY. The husband was in prison and the appellee-wife placed their child in the custody of the husband's parents as it was necessary for her to work. Upon the husband's release from prison, he sued for and obtained a divorce; there was no provision for custody of the child. It was two weeks after the divorce decree before the appellee received notice thereof. Appellee subsequently remarried and in *Newman v. Young*[75] she sued for custody of her child. She and the appellants, the grandparents, agreed that the child's father was not a necessary party to this suit. Upon appeal, the appellants contend that it was error to proceed without the father. The court held that this issue was not before the court for review and that, as there was no evidence of abandonment of the child by the appellee, the decision of the chancellor in awarding custody of the child to the mother was correct.

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[71] 61 So. 2d 350 (Miss. 1952).
[72] 61 So. 2d 144 (Miss. 1952).
[73] 60 So. 2d 778 (Miss. 1952).
[74] Lynch v. Lynch, 63 So. 2d 657 (Miss. 1953).
[75] 61 So. 2d 296 (Miss. 1952).

The court construes Section 1269 of the Code that no child can be adopted if a parent objects unless it appears that the parent has abandoned the child or is mentally or morally unfit to rear and train it, "in either of which cases the adoption may be decreed notwithstanding the objection of such parent, first considering the welfare of the child . . . sought to be adopted." The court's construction is that the issue of the welfare of the child is not reached until it be determined that the parent has abandoned or is unfit. In this case the father had been sentenced to the penitentiary for ten years but had allegedly been rehabilitated. The court felt that even though the adoptive parents were much better off financially and otherwise fit, yet the natural parent, still being fit to rear the children and financially able to do so comfortably, should have custody of the children.[76]

An adoptive parent has no action for wrongful death of such child.[77]

GUARDIAN AND WARD. When a guardian converts the money of his ward to his own personal use, without previously having arranged by proper proceedings under MISS. CODE § 421 (1942) to borrow the funds upon security approved by the court, the guardian has been guilty of a breach of his bond and he and his bondsmen become liable as in debt for the money thus converted. There is no authority in any court in this state to release that debt except upon its payment, which payment must be money, rather than property or securities. The interest rate for simple debt is six per cent and this is the rate that will be charged where there is mere neglect of duty without fraud or intentional misconduct. Interest will be compounded only where fraud, gross negligence, or abuse of trust is shown. *Jones v. Parker*.[78]

VII

WORKMEN'S COMPENSATION

The court was called upon to decide a large number of cases under the Mississippi act. They were, for the most part, necessarily decided upon factual situations. The case of *Mastin & Co. v. Mangum*[79] involved an injury to a leg on November 29, 1950. On December 21, the injured man noticed a stinging and protrusion in the lower abdomen. There were no prior symptoms. MISS. CODE § 6998-12 (1942) provides that a protrusion or rupture must immediately follow as the result of strain, and that physical distress resulting from the protrusion of hernia or rupture must be noticed immediately and reported to the employer within a reasonable time. The physician who testified was unable to say definitely that the injury was the cause of the hernia. It was said by the court in denying recovery that claims based on hernia are placed by the legislature in a special category because of the difficulty in accurately diagnosing the causes thereof. An employee has the overall burden of proving the facts prerequisite to recovery.

In *Meador v. Dollar Store*[80] a claimant for hernia did not prove the attendance of a physician within five days after the injury; the court

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[76]Mayfield v. Braun, 65 So. 2d 235 (Miss. 1953).
[77]Boroughs v. Oliver, 64 So. 2d 338 (Miss. 1953).
[78]61 So. 2d 681 (Miss. 1952).
[79]61 So. 2d 298 (Miss. 1952).
[80]64 So. 2d 574 (Miss. 1953).

said that he could not be excused from the requirement because of being bed-ridden with the flu "immediately after his injury." The court refused to speculate as to any other possible excuses. "It may be that the . . . requirement of the act, . . . attendance of a physician within 5 days after . . . injury, is . . . difficult . . . for a claimant to meet, but that is a matter for the legislature. We must interpret the statute as it is written."

Scope of Employment. As to scope of employment, where the evidence tended to show that the claimant was frolicking from 11 a.m. to 5 p.m., even though in the area in which he would have been about his master's business, the presumption that he was so engaged cannot stand.[81] In another instance, a claimant was employed to operate a gin and in the off season to do odd repair jobs; he was injured while putting up a political sign for one of his employers. This was held compensable as being within an extended scope of employment. Upon suggestion of error by the insurance carrier, two justices joined with one other already dissenting justice to say that the claimant had two types of employment —one for the gin partnership and one for the individual partner, so that his injury was "entirely unrelated to the business enterprise" of the partnership insured for ginning operations.[82]

In *Ready's Shell Station & Cafe v. Ready*[83] the claimant did bookkeeping work at home. On the night of her injury she was preparing to do such work and removed a shotgun from a couch before sitting there. As she picked up the gun, it went off and injured her. The court allowed recovery upon the theory that the presence of the gun represented a risk to the claimant and that it was necessary for her to remove it; it was further held that the injury occurred in the course of her employment.

Independent Contractor. To determine whether a claimant is a servant or independent contractor the court indicates it will apply either the control test or the relative nature of the work test. The former may be stated in terms of in whom is the right to control the details of the work; the latter should be stated as a review of "the nature of the claimant's work in relation to the regular business of the employer."[84]

Congenital Physical Condition. In *Ingalls Shipbuilding Corp. v. Byrd*[85] the appellee's unknown physical condition, a congenital, angiomatous malformation in his back, was aggravated by pressure in the course of his employment causing thrombosis. The court said that in such case they would look through the form into the substance which is the policy of the act and award compensation where the employee has been injured while in the usual course of employment when it requires his exposure to the hazard of precipitating a dormant and potential risk of physical weakness into an injury which, but for the particular employment, would not have happened. A pre-existing disease or infirmity of the employee does not disqualify a claim under the "arising out of employment" requirement if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death

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[81]Majure v. Alsup, 63 So. 2d 113 (Miss. 1953).
[82]National Surety Corp. v. Kemp, 65 So. 2d 840 (Miss. 1953).
[83]65 So. 2d 268 (Miss. 1953).
[84]Kughn v. Rex Drilling Co., 64 So. 2d 582 (Miss. 1953).
[85]60 So. 2d 645 (Miss. 1952).

or disability for which the compensation is sought. The case also involved the question of whether proper notice of the injury had been given to the employer. Section 12 (a) of the Workmen's Compensation Act requires notice to the employer, manager or designated representative of the employer within thirty days after the occurrence of the injury. Here, the appellant's general foreman was told as much about the injury as the appellee himself knew. The court further said that failure to make the claim within the prescribed period will not bar recovery if the injury is latent and progressive and cannot, with reasonable certainty, be recognized at first as compensable. The claim for medical and hospital expenses was disallowed because they were not requested from the employer as is required in the amendment, Miss. Laws 1950, c. 412, § 7.

Upon this same basis of compensation where a pre-existing infirmity is aggravated by the employment, the court affirmed an award for a claimant who was allergic to a glove he had to wear to remove bread pans from an oven.[86]

AWARDS. In *Pathfinder Coach Co. v. Cottrell*[87] the court upheld an award to the bigamous wife and illegitimate child of an employee under the Workmen's Compensation Act. The legislature determined the public policy and evidently felt that the compensation was needed to keep such dependents off public charities. This provision, then, is not in conflict with Section 241 of the Mississippi Constitution.

Mississippi does not hold that an injured employee's wage earning capacity is figured from an actual comparative wage after injury with actual wage before injury. Rather, it adopts the view that actual post-injury earnings will create a presumption of earning capacity commensurate with them, but the presumption may be rebutted by evidence independently showing incapacity or explaining away the post-injury earnings as an unreliable basis for estimating capacity. Unreliability of post-injury earnings may be due to a number of things: increase in general wage levels since the time of the accident; claimant's greater training; longer hours worked; payment of wages disproportionate to capacity out of sympathy; or the temporary and unpredictable character of post-injury earnings. Such was the holding of the Mississippi Supreme Court in *Karr v. Armstrong Tire and Rubber Co.*[88]

In *LaDew v. LaBorde,*[89] under the authority of *J. & B. Manufacturing Co. v. Cochran,*[90] six per cent interest was allowed on a compensation award from its due date; under authority of *M. T. Reed Const. Co. v. Martin,*[91] five per cent damages was allowed on all payments of compensation due at the time this cause was affirmed.

REGULAR EMPLOYEES. An employee of a subcontractor was injured in the building of a house in *Jackson v. Fly.*[92] The subcontractor admitted employing as many as ten men on various jobs as various times but never more than seven on any one day. He did this to avoid criminal

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86Hardin's Bakeries, Inc. v. Ranager, 64 So. 2d 705 (Miss. 1953).
8762 So. 2d 383 (Miss. 1953).
8861 So. 2d 789 (Miss. 1953).
8963 So. 2d 825 (Miss. 1953).
9062 So. 2d 378 (Miss. 1953).
9163 So. 2d 528 (Miss. 1953).
9260 So. 2d 782 (Miss. 1952).

prosecution under Miss. Laws 1948, c. 354, § 36 for failure to secure payment of compensation for injury. In its opinion the court said that MISS. CODE § 6998-03 (1942), provides that employers subject to the Workmen's Compensation Act are those with eight or more workmen regularly employed in the same business. § 6998-04 provides that if the subcontractor has eight employees and has not secured payment of compensation, the contractor shall be liable. If an employer has once regularly employed enough men to come under the Act, he remains there even where the number employed temporarily falls below the minimum. They do not all have to be employed on the same job. They may be regularly though not continuously employed.

HORSEPLAY. In *Miles and Consolidated Underwriters v. Myatt*[93] the claimant was injured in horseplay between himself and another employee. The court said, in allowing the claim, "under our compensation laws injury from horseplay is an assumed risk by the employer." The hazard of assault by one employee on another is compensable the same as injury resulting from such a hazard as if he had been injured by a machine in proximity to which he was required to work. In this particular case, the claimant was not the aggressor. The question of liability where the claimant is the aggressor was not decided.

SEAMAN'S ACT. The case of *Quinn v. Porter*[94] involved the U. S. Seaman's Act of 1920 (Jones Act), 46 U. S. C. A. § 688, which provides for suit for damages by an employee against his employer for injuries in the course of his employment. Here, the claimant worked on a fishing boat owned by one Walker. The fish were carried to Quinn's plant. Quinn paid the wages and other expenses. At the end of the season, Quinn received forty per cent of the proceeds and Walker received sixty per cent. Quinn deducted wages and other expenses from Walker's share. The captain and the engineer of the boat were hired by Walker. Claimant charged the captain's negligence caused his injury. The court decided there was no employer-employee relationship between Porter and Quinn. The fact that Quinn exhausted the supply of Walker's pay envelopes and paid the men off in his own envelopes for an interval was not sufficient to create such a relationship. There was no relationship between Walker and Quinn showing a partnership existed. There was no sharing of profits or loss. The division of the money was definite. The existence of such a relationship is essential to recovery under the Jones Act.

VIII

WILLS

In *Shackleford v. Dobbs*[95] there was a will leaving "money to sister." The court was faced with the question of whether postal savings certificates and U. S. Savings Bonds were "money." It said that this was a case of first impression in Mississippi. In holding that these objects did not constitute "money" it was said that the general rule is that in a simple bequest, in the absence of anything in the context to show that the word "money" is used out of its ordinary or popular significance, it

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[93] 61 So. 2d 390 (Miss. 1952).
[94] 60 So. 2d 797 (Miss. 1952).
[95] 61 So. 2d 669 (Miss. 1952).

will not include personal estate in general, but will be confined to money strictly so-called.

INSTRUMENT OF REVOCATION. An instrument of revocation is not void where it fails to show the date of execution. Nor it is void because it fails to show the exact date of the testamentary instrument referred to which the testatrix proposed to revoke. It could be readily identified by parol evidence. The court further held that where the testatrix did not sign the revocation instrument in the presence of a subscribing witness, it was necessary for her to inform the witness that she was executing a revocation of her will and that the signature on the instrument was hers, and that she wrote it. *Kennard v. Evans, Admr.*[96]

INSTRUCTIONS. In *Wallace v. Harrison*[97] an instruction to the jury, where the jury was told that it was necessary for two "credible" witnesses to attest the will, was error. The court said that although the statute says "credible" witnesses, yet it is well established that what it means is "competent." The jury might well believe a person is not credible or trustworthy, although there is no doubt he is a competent witness. A further instruction to the jury to examine the disposing parts of the will "to ascertain whether they are so extravagant and unreasonable . . . as to be attributed to a distorted mind . . . " was condemned by the court which said it should be made clear to the jury, that however unreasonable and unnatural or unjust they may think the will is, they must uphold it, if, notwithstanding, they believe the testator had testamentary capacity, and was not unduly influenced.

Where the will is of unnatural character, the court held in In re *Estate of Annie Lou Alexander v. Hamilton*[98] that the proponent of the will has the burden of giving some reasonable explanation thereof.

CONSTRUCTION. *Old Ladies Home Asso. v. Miller*[99] involved the construction of a will with the following language: "to . . . brother for . . . life, rings to be sold . . . with exception, . . . the money to be used for a marker for my grave . . . at death of . . . brother . . ., all remaining property and effects are to be sold and proceeds given" to complainants. Rather than implying an absolute power of disposition over the property of the life estate, the phrase "all remaining" simply referred to property remaining in the estate after the sale of the rings and after proper use of the same during the life estate.

DESCENT AND DISTRIBUTION. A husband was convicted of manslaughter in Ohio; this was held not necessarily to mean "wilful killing" so as to prevent the killer from inheriting from the deceased wife. MISS. CODE § 479 (1942) denying inheritance in such a case is not penal and does not work a forfeiture of any vested right.[1]

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[96] 65 So. 2d 285 (Miss. 1953).
[97] 65 So. 2d 456 (Miss. 1953).
[98] 61 So. 2d 683 (Miss. 1952).
[99] 63 So. 2d 786 (Miss. 1953).

IX
EVIDENCE

In *Parker v. Laubenheim*[2] there was a charge that a mineral deed was procured by fraud and misrepresentation. There was an attempt by the defendant to introduce testimony of a person accompanying him around the community to purchase such mineral rights. The purpose of the testimony was to show that there had been no other instances of fraud. The evidence was excluded on the ground that this was not an attempt to show other alleged fradulent procedures but rather those that were different from that alleged to have been followed here.

Dying Declaration. The court, in *Hardeman v. State*[3] said, "A dying declaration is made without the sanctity of an oath and without an opportunity to cross-examine the declarant. To take the place of that sanctity and that right, there must be an undoubted belief in the mind of the declarant at the time the declaration is made that death is upon him. If it appear that he has any hope of recovery, however faint, the required sanctity is not afforded, and the alleged dying declaration cannot be received." The statements of the declarant were all excluded until she made the statement "I am going home." One statement was admitted which was made after this remark and the Supreme Court pointed out that the lower court was very liberal in allowing the statement because it was not known that such statement meant the declarant knew of her impending death. The defendant here was accused of shooting the declarant and there was an attempt to introduce a statement of the deceased to the effect "you know he would not have done it." The court held that this was properly excluded as it represented a conclusion or opinion.

Accomplice. A defendant can be convicted on the uncorroborated testimony of an accomplice, but the court has carefully restricted the scope of that doctrine by holding that such uncorroborated testimony should be viewed with great caution and suspicion, and must be reasonable and not improbable or self-contradictory, or substantially impeached. *Cole v. State.*[4]

Res Gestae. In the case of *Knight v. State,*[5] *supra,* the defendant was convicted of manslaughter. A statement by a witness to the defendant, as follows: "I told you not to do that. Now you have got yourself in a world of trouble," was admissible as part of the res gestae.

Admissions. When a statement tending to incriminate one accused of committing a crime is made in his presence and hearing, and such statement is not denied, contradicted, nor objected to by him, both the statement and the fact of his failure to deny it are admissible in a criminal prosecution against him, as evidence of his acquiescence in its truth. The evidence is not offered in proof of a fact asserted but as a predicate to the showing of the reaction of the accused thereto. It is permitted to go into the record on the presumption that silence or failure to deny, is an admission. Thus, the well-established rule was followed in

[1]Henry v. Toney, 64 So. 2d 904 (Miss. 1953).
[2]60 So. 2d 815 (Miss. 1952).
[3]61 So. 2d 797 (Miss. 1953).
[4]65 So. 2d 262 (Miss. 1953).
[5]60 So. 2d 638 (Miss. 1952).

Gillespie v. State.[6] The same result was reached in *Henry v. Toney, supra,* where a police chief was permitted to testify as to statements made by the deceased, which statements were made in the presence of the defendant and he admitted them at the time.

CONFESSIONS. In Mississippi the fact that an accused is not warned that the statement he is about to make may be used against him at the trial does not render a confession involuntarily. *Tanner v. State.*[7]

In *Lackey v. State*[8] the defendant confessed to the jailer and the court held the testimony of the jailer was admissible because the confession was voluntarily made, and whether it was considered to be an implied confession or an admission, it was relevant.

Sullivan v. State[9] simply states the Mississippi position on confessions and the corpus delicti. "The rule is that, while the corpus delicti cannot be established by the extrajudicial confessions of the defendant unsupported by any other evidence, it may be established by such a confession corroborated by other facts and circumstances. And it is not necessary to prove the corpus delicti by evidence entirely independent and exclusive of the confession, but sufficient proof to convict exists when the corpus delicti is established by other evidence and the confession taken together."

FORMER CRIMES. Where a defendant shot a husband and a few minutes later shot the wife, it is not error to admit evidence of assault upon the wife. Testimony which may disclose the commission of other crimes is nevertheless admissible upon the trial of an indictment where such other crime is connected with the one charged in the indictment, and the proof of such other crimes sheds light upon the motive of the defendant for the commission of the crime charged in the indictment; or where the fact of the commission of such other crime forms a part of a chain of facts so intimately connected that the whole must be heard in order to interpret its parts. Such was the holding in *Tanner v. State, supra.* The same type of closely connected evidence was held relevant and of probative value in *Sykes v. City of Crystal Springs, supra.*

NON-RESIDENT WITNESS. MISS. CODE § 1711 (1942) provides that a deposition of a party or interested witness may not be admitted in evidence for the party taking it if any party shall make and file an affidavit ten days before the time of the trial to the effect that oral examination in open court is necessary to the attainment of justice, if the person be alive at the time of trial and not unable to attend court on account of disability from permanent sickness, physical injury, or from weakness and disability incident to old age. The court was required to determine whether this statute applied to non-resident witnesses in *Milner Products Co. v. S. S. Salitan.*[10] The question had not been decided since 1871 when the statute was enacted. The court said that the statute provides that "any party or witness required to attend shall be entitled to compensation as any other witness," and since the witness is not entitled to compensation unless subpoenaed it follows that the statue

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[6] 61 So. 2d 150 (Miss. 1952).
[7] 61 So. 2d 781 (Miss. 1953).
[8] 60 So. 2d 503 (Miss. 1952).
[9] 63 So. 2d 212 (Miss. 1953).
[10] 61 So. 2d 303 (Miss. 1952).

does not apply to non-residents as it is recognized that such persons could not be subpoenaed. The practical effect of enforcing the statute as to non-residents would be to prohibit such litigants from seeking relief in the courts of this state. Such, surely, could not have been the intent of the legislature. Since the "interested witness" could not be forced to attend, if his deposition cannot be taken, a litigant would be powerless to obtain his testimony. The right to confront and cross-examine witnesses is preserved by propounding interrogatories to the non-resident parties, which, if not answered, may result in a decree pro confesso. The affiant in such cases runs no risk in making the affidavit and, it follows, that the practice would be used frequently.

CHARTS. In *Lackey v. State, supra,* a physician was allowed to introduce charts to explain medical and anatomical terms. The court held that the test as to their admissibility is their capacity in inform the jury, and where they are accurate and fully explained, they are admissible even though they are abstract.

SEARCHES AND SEIZURES. The court had before it the question of illegally obtained evidence in *Branning v. State.*[11] In this case the sheriff of Noxubee county contacted the sheriff in Columbus, Mississippi, told him that a drugstore in Brooksville, Mississippi, had been burglarized, and that the suspected man was staying at a hotel in Columbus and had been in the drugstore the day before. He gave a description of the man, his woman companion, and his car. The next day the chief of police saw such a car. He stopped the car, and while going to it he saw the defendant take something out of his pocket and place it in the ash tray of his car. He arrested the man without a search warrant and took a box from the ash try containing five tablets of morphine. The court held that the fact that the appellant had been in the store the afternoon of the robbery was not sufficient reason to believe him to be the guilty party. Good ground to believe that a person was present at the time a felony was committed is not enough. The court in holding that the evidence here was unlawfully obtained refused to consider present day methods of transportation, means of escape, and risks of officers and disposed of these contentions by saying this was a problem for the legislature.

In *Feazell v. State*[12] the court held that a search warrant for the premises of one person does not give authority to search the premises of unenclosed adjoining lands. A search warrant was involved also in *Burgess v. State.*[13] In this case the court said that Section 23 of the Mississippi Constitution assuring people that they will be secure in their persons and homes from unreasonable search and seizure is violated where an officer serving a search warrant completes the search before making known to a defendant his authority for being on the premises. It is said "it is too late to legalize retroactively the illegal search already finished, or to make the evidence obtained thereby admissible at the trial."

A different problem was confronted in *Williams v. State.*[14] Here the

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[11] 60 So. 2d 633 (Miss. 1952).
[12] 65 So. 2d 267 (Miss. 1953).
[13] 65 So. 2d 260 (Miss. 1953).
[14] 61 So. 2d 793 (Miss. 1953).

officers were lawfully upon the premises, under a search warrant based upon probable cause, and the property siezed was property which was not specified in the search warrant. However, the possession of the property was unlawful for the reason that it was stolen. Seizing this property was held not to constitute illegal search and seizure.

In *Jones v. State*[15] Justice Ethridge traces the Mississippi view on illegal evidence back to *Tucker v. State,* 128 Miss. 211, 90 So. 845 (1922), when the federal rule was adopted; it is now followed by a minority of states, and in this case, Mississippi remains with the minority. Police officers had a search warrant for certain premises; upon their arrival there, the defendant ran out the back door of the building and was followed by a deputy. After chase, the defendant dropped a suitcase of whiskey. The court held that the search and seizure began when the chase began and the appellant was not committing any misdemeanor or other offense in the officer's presence. The search was illegal and the evidence was inadmissible in prosecution for unlawful possession of intoxicating liquor.

However, testimony of a sheriff was admissible when he suspected liquor was to be unloaded on certain premises and went there and concealed himself upon a public highway; from that location he watched the unloading and smelled the liquor. The observed acts were in the commission of a felony which would sustain an arrest without a warrant.[16]

The day after an arrest a sheriff may not go on the arrested person's premises without a warrant.[17] Photographs of persons standing in the purported positions of the parties involved in a crime are not admissible in evidence; they are staged and are not simply reproductions of the scenes of the alleged crimes.[18]

Privileges and Immunity. When two parties went to an attorney to have a joint account made out of the more aged one's bank deposits, controversy later arose over the sanity of the aged person. In such case, any information as to the sanity of the transferor could not be considered as privileged between the attorney and the client since the transaction was carried out in the presence of a third party.[19] Similarly, a question of immunity arose when a defendant was compelled to testify against himself in an action to enjoin his sale of intoxicating liquor. The court construed Miss. Code § 2630 (1942) which says that ". . . no person shall be prosecuted or subject to . . . any . . . forfeiture for . . . any . . . matter . . . concerning which he may testify . . . before the grand jury, or any court . . ." The defendants had been held by the sheriff until they could make bond; this, says the court, is a forfeiture prohibited by the statute. The courts adds that it "is not our province to write the statutes, but only to construe them as written."[20]

Turnage v. State[21] involves a peculiar situation where the defendant

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[15]62 So. 2d 334 (Miss. 1953).
[16]Harris v. State, 63 So. 2d 396 (Miss. 1953).
[17]Martin v. State, 64 So. 2d 629 (Miss. 1953).
[18]Martin v. State, *supra* note 17; Buie v. State, 64 So. 2d 897 (Miss. 1953).
[19]Turnipseed v. Drummond, 63 So. 2d 536 (Miss. 1953).
[20]Zambroni v. State,*ex rel.* Hawkins, 64 So. 2d 335 (Miss 1953).
[21]63 So. 2d 220 (Miss. 1953).

was hard of hearing and did not know until after the trial that the state's attorney referred to the woman at his house as his wife. The attorney addressed the jury: "If no one came to his house that day as Mr. Turnage testified why did he not have his wife present to testify that such was true?" Generally this comment, of course, would not be allowed. As it turned out, the woman referred to in some of the testimony as having been there was not his wife, but at the time the statement was made to the jury all the testimony pointed to the fact that she was. "The situation was the same as if the woman referred to had been the wife of the appellant, and that the ruling of the court should be considered as if she had been his wife."

INSANITY. The lower court was reversed in *Shipp v. State*[22] where seventeen experts agreed on the insanity of the accused and the court refused a preliminary hearing on the question of insanity. As an ancillary issue to this case the court said that a motion of a district attorney for nolle prosse must have the consent of the court.

A defendant has the right to have a preliminary inquiry by the court into the sanity and mental capacity of a witness to testify, if he asks for it *before* the witness has testified. A refusal of that right constitutes the denial of substantial right protected by the due process clause of the federal and state constitutions. The trial court cannot rely upon evidence heard by it on another occasion and in a different legal proceeding to which the defendant was a stranger and in which he had no opportunity to offer testimony or to propound questions.[23]

In defense under an indictment for rape, testimony of isolated and particular acts of adultery with *third* persons is not admissible, but such acts on the part of the alleged victim and the accused shortly prior to the act complained of are relevant and material.[24]

DEMEANOR OF ACCUSED. The lower court allowed officers to testify as to whether, in their opinion, the accused, who was charged with the killing of his wife, showed signs of grief in *Harrelson v. State*.[25] Upon appeal the court reversed the decision on the grounds that the testimony was improper and highly prejudicial. The demeanor and acts of the accused are admissible, but the reactions of a person to sorrow or grief are not because they vary with the individual.

X

TORT

RES IPSA LOQUITUR. In *Peerless Supply Co. v. Jeter*[26] a wheel came off a truck owned by the defendant and ran into a car driven by the plaintiff, causing injuries to the plaintiff. She brought suit based upon the doctrine of *res ipsa loquitur*. The court held that where the instrumentality that caused the injury was under the exclusive control and management of the defendant and the accident was such as would not have happened had the defendant used proper care, and the initial cause of the accident is not explained, the doctrine of *res ipsa loquitur* applies.

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[22]61 So. 2d 329 (Miss. 1952).
[23]Butler v. State, 63 So. 2d 779 (Miss. 1953).
[24]Smith v. State, 64 So. 2d 557 (Miss. 1953).
[25]65 So. 2d 237 (Miss. 1953).
[26]65 So. 2d 240 (Miss. 1953).

NEGLIGENCE. A question of negligence was present in *Haynes v. Graves*[27] where sparks from the defendant's mill were alleged to have caused a fire resulting in the destruction of the plaintiff's barn. The issue was whether a prima facie case had been made out. It apeared that the mill was 680 feet from the barn and there was a fire at the mill on the day in question. There was evidence that the defendant used customary precautions to protect the escape of sparks and also that there had been a fire on a strip of woods between the mill and the barn on the particular day. This latter evidence was sharply disputed. The court held that under the above circumstances a prima facie case had been made out. It pointed out that this was not a case where a fire set by the defendant upon his own land had been, by a sudden and unforeseeable agency such as a sudden and violent wind, carried upon the property of another.

The court set up a strong test of care when the interests of a minor are involved in a suit for personal injuries to the minor, as in *Dr. Pepper Bottling Co. v. Lilly*.[28] In this case a truck belonging to the defendant ran into and injured the plaintiff, a nine year old boy, who was riding a bicycle on the highway. In holding the company liable for damages the court said that the driver of a motor vehicle may not assume that others on the highway will obey the laws of the road. When passing children, the motorist is required to use proper care in giving necessary signals, in bringing his car under control, and in anticipating the unusual and impulsive actions of persons of immature years. He must anticipate that young persons will not always act to protect themselves from danger as will a mature adult under the same circumstances. If he uses all reasonable precautions and the child creates the emergency, the accident is unavoidable and there is no liability. The court also said that had the defendant relied on the theory of contributory negligence, it would have had a heavier burden to carry since "such a child is prima facie presumed not to be possessed of sufficient discretion to make him guilty of contributory negligence in failing to exercise due care for his own safety."

In *Higgins Lumber Co. v. Rosamond*[29] some architects, not bound under this contract to do so, undertook to lay out a building and assured the plaintiff-builder that the layout was accurate; the layout was erroneous and the builder had to correct the error at some expense. It was said that the architects gratuitously assumed a duty, which duty they must carry out without negligence.

PROXIMATE CAUSE. "There may be more than one proximate cause of an accident or injury, and where there is more than one proximate cause, each of the concurrent efficient causes contribute directly to the accident or injury is a proximate cause thereof." It was so held in *Continental Southern Lines v. Klaas*.[30]

FALSE ARREST AND IMPRISONMENT. *Hudson v. Pevsner*[31] involved a suit for damages against the manager and owner of a jewelry store. The plaintiff cashed two checks and paid a small amount each time on her bill. The checks were made by other persons. It was unknown to the

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[27] 60 So. 2d 812 (Miss. 1952).
[28] 60 So. 2d 603 (Miss. 1952).
[29] 63 So. 2d 408 (Miss. 1953).
[30] 65 So. 2d 575 (Miss. 1953).
[31] 61 So. 2d 777 (Miss. 1953).

manager which of the employees had cashed the checks. The checks were dishonored and the manager made affidavit against the plaintiff for obtaining money under false pretenses. The justice of the peace issued a warrant to the manager which the manager gave to the sheriff, who arrested the plaintiff and placed her in jail. The county attorney later dismissed the prosecution. Both the owner and the manager were held liable. The manager appealed whereupon the court found that the testimony showed no authority for the manager to cash the checks and pay out the employer's money thereon. Also there was shown no authority to have persons arrested and jailed when the checks, so cashed, were turned down by the bank. But even without such authority, the criminal prosecution of the person receiving the money is not the appropriate means to collect the debt.

The responsibility of public officers is pointed up in the case of *State for Use of Little v. U. S. F. & G. Co.*[23] There a justice of the peace drew up an affidavit for "bad check" against the plantiff for the dishonor of a check clearly without his jurisdiction of Warren county. Further, the sole purpose of the affidavit, admittedly, was to coerce the plaintiff into paying the amount of the check, which he did with some difficulty and embarrassment in the custody of a sheriff in Hinds county. These acts were held to be abuse of process for which the justice's surety must answer in damages. Similarly, in *State for the Use of Daniel v. McNeal, Sheriff,* the sheriff had to respond in damages for trespass and false arrest when he entered plaintiff's premises without a warrant and watched his informer purchase beer.

Trespass. The factual situation in *Hudson v. Landers*[34] was as follows: The plaintiff purchased land from one Nation. Several days prior to the execution of the deed, Landers purchased by oral agreement timber on the land from Nation's husband with the wife's assent. Landers, in turn, sold the timber right to one Rogers. Rogers, with no notice of the sale of the land to the plaintiff, began cutting the timber. Upon notice of the sale, Rogers ceased cutting timber. There was conflicting testimony as to whether Rogers removed the timber already cut but it was undisputed that the plaintiff sold the tops and small trees for $175. The suit was for $1000 actual damages and $1200 statutory damages. The court held that the oral agreements between Nation and Landers and between Landers and Rogers, while void because of the statue of frauds, nevertheless constituted a license to enter upon the land until revoked. There was no wilful wrong committed nor gross negligence, thus no statutory damages could be allowed. The $175 received from the sale of the small trees was deducted from the $1000 recovered and the defendant Landers was held not liable for any sum upon the grounds that one who merely sells property to which he has no title is not liable for trespass committed by his vendee.

Animal on Highway. In *Pongetti v. Spraggins*[35] the plaintiff ran into a calf belonging to the defendant on a public highway. The evidence showed that the defendant had taken precautions against the

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[32] 64 So. 2d 697 (Miss. 1953).
[33] 64 So. 2d 636 (Miss. 1953).
[34] 61 So. 2d 312 (Miss. 1952).
[35] 61 So. 2d 158 (Miss. 1952); *accord,* Dollarhide v. Knight, 62 So. 2d 367 (Miss. 1953).

animal's escape from his barn and had not been negligent. Miss. Code § 4876.5 (1942) was the basis of the plaintiff's action. It was held that this was not an example of the use of the doctrine of res ipsa loquitur. The plaintiff must show that the defendant was negligent in allowing the animal to be loose and failed to make an effort to recapture it. The court further said that the statute in question imposed no criminal liability upon the owner for permitting his stock to run at large on the highway. The words of the statute "to permit such livestock to run at large" imply intent that there must be knowledge, consent, or willingness on the part of the owner or the equivalent negligence.

Actionable Words. In an editorial in his newspaper the defendant said: "If Representative Walley wanted to serve Greene County's best interest, why were these highways removed from 'priority'?" The plaintiff Walley brought action based on Miss. Code § 3175 (1942), alleging that this statement reflected upon his "honesty or integrity or moral character." The court said that although the editorial was misinformation which the plaintiff had to counteract and that it was unfair for the defendant to refuse to publish Walley's answer, yet the statement did not reflect in the defamatory manner set ut in the statute.[36]

Damages. When defendant's truck backed into the plaintiff, plaintiff was allowed actual damages to his car and damages for nervousness which affected his college work.[37]

XI

PROCEDURE

Where the lower court does not render a money judgment, a judgment entered in the appellate court should not impose statutory damages. It was so held in *Stephens and American Mutual Liability Ins. Co. v. Moore*.[38]

Res Judicata. The well recognized doctrine of res judicata was followed in *Broadhead v. Stone*. The plaintiff brought suit in Hinds county chancery court to enjoin tax collection and to seek cancellation of a tax distraint warrant on lands in Clarke county. The court denied the relief, and the Supreme Court reversed on appeal. Subsequently, while this appeal was pending, the appellant filed another suit in Clarke county seeking the same relief. The appellee filed an answer and cross-bill pleading res judicata. This plea was sustained, and on appeal the court granted a motion to dismiss the appeal.

Juries. After retiring to reach its verdict, one of the jurors made an inquiry of a person not a member of the jury. He failed to get an answer to his question. In *Dalton v. Madison*[40] the court said that this was no ground for a mistrial because the inability of the person to answer the particular question was more calculated to favor the defendant's contention that to refute it. Rule 11 of the Supreme Court provides that "no judgment shall be reversed on the ground of improper admission or exclu-

[36]Manasco v. Walley, 63 So. 2d 91 (Miss. 1953).
[37]Ross & Co. v. McWhirter, 63 So. 2d 38 (Miss. 1953).
[38]60 So. 2d 391 (Miss. 1952).
[39]58 So. 2d 903, *suggestion of error overruled* 59 So. 2d 844 (Miss. 1952)
[40]61 So. 2d 688 (Miss. 1952).

sion of evidence, . . . unless it shall appear affirmatively, from the whole record, that such judgment has resulted in a miscarriage of justice." The jurors here were not corrupted or influenced by outside matter.

In *Ware v. State*[41] a juror, during deliberation of the jury, called the bailiff to the door of the jury room and asked him to contact the judge and ascertain the punishment which would be imposed in the event of the conviction. The bailiff questioned the judge and reported his answer. The judge later dictated into the record that he had no knowledge as to what had been done with the information which he had given to the sheriff. The court held that this was reversible error.

In the case of *Tubb v. State*[42] the district attorney in his closing argument to the jury made the statement that the scene of the killing was a "den of iniquity" and that there was drinking, gambling and dancing there and further concluded that "if you are going to turn a man loose who kills another in a place like that, we cannot enforce the law." This represented a complete departure from the evidence of the case and was an improper and prejudicial argument. Also, the district attorney's statement that "he knew the State's witnesses were telling the truth because he investigated the case" was highly prejudicial and constituted extra-judicial testimony.

In Hattiesburg two non-residents purportedly shot two policemen and there was a great amount of publicity given to the incident. In addressing the grand jury, the judges said that "some people have come into the county and taken the lives of two soldiers who have paid the supreme sacrifice to uphold the law"; on appeal attacking the indictment the Supreme Court said that the judge did not name the defendant indicted for the crime, so that his charge did not coerce the grand jury to indict him. A dissenting opinion sets forth that the judge might as well have named the defendant, and wonders how the jury could have refused to make the indictment after being admonished, "Will you be a good soldier, or will you throw down your gun and run, or will you hide in the dugout?"[43]

The following instruction was held to be argumentative and to comment on the weight of the testimony in *Knight v. State*. "The fact that officers did not find a weapon upon or near the body of the deceased during their investigation did not establish guilt of the defendant and in order to believe that the defendant acted in self-defense at the time of the firing of the fatal shot, it is not essential that the defendant show that the deceased actually had a deadly weapon; but in cases of this character the law authorizes action on reasonable appearances; and if the conduct of the deceased was such as to induce a reasonable belief that the deceased had a deadly weapon, then the defendant was justified in assuming that the deceased had one." The court further held that it was no error because no instruction was given limiting the verdict to manslaughter. One convicted of manslaughter may not complain of an instruction authorizing a conviction of murder. By the same reasoning an accused may not complain of the refusal of an instruction limiting the

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[41]65 So. 2d 236 (Miss. 1953).
[42]64 So. 2d 911 (Miss. 1953).
[43]Wheeler v. State, 63 So. 2d 517 (Miss. 1953).
[44]60 So. 2d 638 (Miss. 1952).

verdict to manslaughter when the jury have done that which such instruction would have required.

The state's instruction to the jury must include the phrase that the jury find "from the evidence" that the defendant be guilty; in some cases omission is reversible error, and in others it may be cured by other instructions.[45]

APPEALS. In the suit of *Shipman v. Lovelace*[46] no question of appeal costs was brought to the attention of the court, no reference was made in the court's opinion or orally from the bench, and, further, no decision was rendered on that subject. The Supreme Court rendered an opinion on the case in May, 1952, and appeal costs were rendered against the appellant. It seems the clerk of the court conceived that an award of appeal costs against the appellant was mandatory under MISS. CODE § 1971 (1942) which provides that "in case judgment or decree of the court below be affirmed, or the appellant fail to prosecute an appeal to effect, the Supreme Court shall render judgment against the appellant at the rate of 5 per cent costs." In this case, after the time for the filing of a suggestion of error had passed, the appellant filed a motion to correct the decree by changing the award of appeal costs so as to assess the costs of the appeal in equal proportions. The appellee contended that this was in the form of a suggestion of error and was barred. The court held that a suggestion of error is to effect a change in a decision actually made or to modify a judgment authorized or intended to be entered. The code section in question was misapplied. It applies only to unconditional affirmances. The decree here was not affirmed but was only modified. A motion to correct judgment lies to correct a judgment entered by the clerk without statutory authority or direction of the court. "This Court has consistently held that allowance or disallowance in a judgment of five per cent damages in contravention of said Section 1971 may be corrected on motion even after the expiration of the term at which the judgment was rendered. . . . The same rule applies to the provision of costs."

The state cannot appeal when there is no question of law to be settled; when the appeal is based on a peremptory instruction for the defendant for insufficiency of evidence, no question of law is presented and the appeal must be dismissed.[47] There is no such procedure as a suggestion of error after the denial of a motion of appellee to dismiss an appeal.[48]

INTERLOCUTORY DECREE. The question of an award made by arbitrators was submitted to the chancellor in *Horne v. State Building Commission*.[49] The chancellor refused to rule on the award, but sent it back to the arbitrators for further study. This interlocutory decree of the chancellor was made the basis of an appeal. The court said that such an appeal is not authorized by MISS. CODE § 1148 (1942), since a decision on the appeal would not only not settle all the controlling principles involved, but would not settle any, and would only result in additional delay and expense.

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[45]Cothern v. State, 63 So. 2d 820 (Miss. 1953).
[46]60 So. 2d 559 (Miss. 1952).
[47]State v. Jackson, 64 So. 2d 341 (Miss. 1953).
[48]Johnson v. St. Catherine Gravel Co., 63 So. 2d 393 (Miss. 1953).
[49]65 So. 2d 227 (Miss. 1953).

AFFIRMATIVE DEFENSE. In *Calvert Fire Ins. Co. v. Swain*[50] the court held that it was reversible error to admit testimony on behalf of the plaintiff seeking to avoid an affirmative defense set up in the answer of the defendant, without the plaintiff's having filed a reply to such affirmative defense setting forth the special matter intended to be proved in avoidance thereof.

TRANSCRIPT. It is not error to allow the trial court to correct a transcript after it is filed in the Supreme Court. This was the holding in *Butler v. State*,[51] wherein the court said that the records of a court can be corrected or altered only by the court itself; another court has no authority to make such corrections, even though it has appellate jurisdiction.

In *Carroll Notion Co. v. Neville, Trustee*[52] a motion was made to eliminate numerous pages of the record as made up by the trial court clerk in duplication of other pages of the record, thereby reducing the costs of the losing litigant. The court granted the motion saying that where no point is made in the trial court as to the sufficiency of process it is not necessary to copy subpoenas and returns of officers into the record. The court re-emphasized the need of including only such matters as are material to the determination of the cause on appeal: pleadings, indictment, evidence, motions, orders, instructions, judgments, or idexes to record.

The court applied MISS. CODE § 1643 (1942) in *Parmlee v. City of West Point*.[53] This statute is as follows: "If notice as above required is given to the court reporter by the appellant or his counsel within ten days after the conclusion of the terms of the court, no court reporter's transcript of his notes shall be striken from the record of the Supreme Court, for any reason, unless it be shown that such notes are incorrect in some material particular, and then only in cases where such notes have never been signed by the trial judge, nor been agreed on by the parties, nor become a part of the record as provided by this chapter."

MOTION FOR CONTINUANCE. A motion for a continuance was overruled in *Whittington v. State, supra*. The grounds for the motion was the absence of a witness because of illness. The court held that the application fully complied with MISS. CODE § 1520 (1942), and complied with the procedure governing continuances as set out in *Lamar v. State*,[54] which rules have been consistently followed by the Mississippi Supreme Court. The only contention in this case was that, even in the presence of the missing witness, the result would probably have been the same. The court disposed of this contention by saying that whatever the weight of the testimony, it was material and the continuance should have been granted. In *Lee v. State*[55] the appeal was based on the ground that the court erred in overruling a motion for a second continuance because of the absence of a sick witness. The court affirmed the judgment saying, "it is necessary to preserve this point in a motion for a new trial with

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[50] 65 So. 2d 253 (Miss. 1953).
[51] 63 So. 2d 779 (Miss. 1953).
[52] 65 So. 2d 140 (Miss. 1953).
[53] 61 So. 2d 444 (Miss. 1952).
[54] 63 Miss. 265 (1885).
[55] 59 So. 2d 338 (Miss. 1952).

an affidavit of the absent witness or evidence as to why her affidavit could not be obtained."

FINAL ORDER. During the pendancy of litigation in the chancery court appellants filed a petition with the State Oil and Gas Board to have their interests integrated in a forty-acre drilling unit and for other alternative relief. The board entered an order on the petition that the proceedings be stayed until the suit in the chancery court be settled. The movants contended that this was a final order and could be appealed from. In *Proctor v. Hunt*[56] the court held that Miss. Laws 1948, c. 256, § 2 (a) provides that a party aggrieved by a final order of the board shall have the right of appeal, but that this ruling of the board did not constitute such final order.

In *Wells v. Boatner*[57] there was a judgment of a probate court in a contest tbetween two parties for the administration of a decedent's estate, rejecting the claim of one who had the legal preference thereto. The court held that the judgment will be presumed correct where the evidence is not contained in the record. And in regard to the order itself, the court held that it was not interlocutory, but was final and appealable. In the language of the court, "It is not necessary that an appeal from an order withdrawing letters of administration await the final determination of the estate."

CLERK'S FEES. Miss. Laws 1950, c. 239, which provides a clerk's fee of twenty-five cents for every one hundred words for "furnishing transcripts of records," is applicable to transcript pages reproduced either by typewriting or photostating process. Where the clerk fails to state the number of words transcribed in submitting his statement of costs, he may be given leave to amend the statement. *Superior Oil Co. v. Foote*.[58]

In *Musselwhite v. State*[59] a petition was filed for stay of execution alleging insanity after conviction for murder and sentence imposing death. Upon the hearing, it was found that the petitioner was insane, but the judge limited the stay in the nature of a supersedeas only pending the appeal. In a lengthy opinion the court discussed insanity and the historical background of its holding in this case. Where the issues involve due process, technical perfection of pleading must not be required and intricate niceties may not be allowed to control. There was no dispute here as to insanity. The only issue was whether or not the execution should be stayed. The right of the sovereign to execute one who is insane has always been denied, at least since the repeal of the Statute, 33 Henry VIII, 20. If a lunatic may not have punitive damages assessed against his property in a civil case, he may not in a criminal case suffer execution against his life. MISS. CODE § 2558 (1942) provides for a hearing upon insanity if the sheriff believes a convict is insane, and the verdict shall be sent to the governor to suspend the sentence until sanity is restored. It is contended that this section is the exclusive remedy here. The court said that the act of the governor is not judicial and possibly not reviewable. Due process requires more than the fact of some hearing. Due

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[56] 60 So. 2d 558 (Miss. 1952).
[57] 61 So. 2d 662 (Miss. 1952).
[58] 65 So. 2d 453 (Miss. 1953).
[59] 60 So. 2d 807 (Miss. 1952).

process gives the accused occasion intelligently to show cause why the sentence of death should not be pronounced. Likewise, there must be available to him as to a rational person avenues toward executive clemency or spiritual consolation. If natural death of the body of one condemned may stay the hand of the executioner it must follow in reason and justice that the death of the mind should have like effect. That part of the order limiting the stay of execution to the period pending the appeal was reversed, and the execution was stayed until the accused be adjudged sane.

AMENDMENTS. In *Continental Southern Lines v. Klaas, supra,* the plaintiff charged negligence but did not set out the specific acts. He attempted to amend his declaration after his evidence of such acts had been admitted without objection and the defendant's objection to the proposed amendment was sustained. Upon the defendant's appeal the court refused to consider this erroneous and said that the defendant could not take advantage of the trial judge's error in not allowing the amendment which the defendant himself induced the court to commit.

WITNESS. The supreme court granted a new trial because of two newly discovered witnesses and, thereafter, one of them died. In *Black v. Stone Lumber Co.*[60] the court held that the fact that this testimony is not now available is not sufficient reason alone for this court to alter its original judgment.

VERDICT CONTRARY TO WEIGHT OF EVIDENCE. In order to preserve for review the point that the verdict is contrary to the weight of the evidence, a motion for a new trial must be made, particularly assigning that ground.[61]

GROUND FOR REVERSAL. In *Payne v. State*[62] a motion was made for a continuance on the grounds that one who was a prisoner in the Hinds county jail would testify that a prosecuting witness came to the jail and identified a third person as the guilty party before identifying the defendant as such. There was overwhelming evidence as to the defendant's guilt.[63] The court refused to reverse because of the fact that the judge overruled the motion for a continuance, saying that Section 1520 of the Code provides that a denial of continuance shall not be ground for reversal unless the supreme court shall be satisfied that an injustice resulted therefrom.

ATTORNEY'S FEES. The appellee in *Mitchell v. Mitchell*[64] requested fifty dollars for attorney's fees for his services in the appellate court. The said attorney was served with a copy of the appellant's brief but failed to submit a brief before the hearing. He requested permission, which was granted, to file a brief out of time. The court, under these circumstances, refused to grant the request for attorney's fee.

There was a failure by the defendant to offer to pay the full amount of the principal and interest shown to be due on the face of a note, which note was attached to the affidavit of probate of the claim in

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[60]63 So. 2d 405 (Miss. 1953).
[61]Youngblood v. State, 62 So. 2d 218 (Miss. 1953).
[62]61 So. 2d 146 (Miss. 1952).
[63]Compare Whittington v. State, *supra.*
[64]65 So. 2d 265 (Miss. 1953).

Peoples' Bank & Trust Co. v. Garner, Extr.[65] The note contained a provision stipulating that the maker of the note would pay the attorney's fees in the event the note had to be turned over to an attorney for collection. In this case the executor of the estate of the maker was attempting to avoid this stipulation. The court held the estate liable for fees in the amount of ten per cent on the principal of the note and accrued interest at the time of the rendition of the judgment. The court said the attorney's fees accrued by the filing of this suit and it was unnecessary to probate the fee which only accrued subsequent to the filing of the probate of the claim.

HABEAS CORPUS-NONSUIT. The accused, under an indictment for murder, petitioned for a writ of habeas corpus. Before resting his case, he moved for permission to enter a voluntary nonsuit without prejudice. The petition was denied. In reversing the lower court, the supreme court held in *Strickland v. Coopwood*[66] that a suit to enforce the right of personal liberty by means of a writ of habeas corpus is civil and not criminal; thus, beyond doubt the petitioner has the right to take such nonsuit. On the subject of writs of habeas corpus the court held in both *Tyler v. Pierce*[67] and *Jones v. Wetzel*[68] that the trial court cannot inquire into the guilt or innocence of the petitioner.

INDICTMENT. In *Grimsley v. State*[69] the original indictment was lost and a copy thereof was used. MISS. CODE § 2442 (1942) provides for using a certified copy if the original be lost or destroyed. The clerk failed to certify the copy and, although the defendant made no obpection to this fact, he attempted to assign it as error. The court held that such omission of the clerk was amendable and the defendant waived its right to object. A further question was raised in this case because the county atorney was allowed to amend the copy of the indictment so as to make the amount in controversy great enough to constitute grand larceny instead of petit larceny. The defendant assigned this as error on the ground that it changed a misdemeanor to a felony without the consent of the grand jury. The court refused to give merit to this assignment for the reason that the amendment did not actually alter the value of the stolen property but only altered the description of the property. Testimony in keeping with the amended description had been offered and there had been no objection by the defendant. This was not a case wherein the amendment denied to the defendant the right to be advised of the nature and the cause of the accusation.

In *Wiggins v. State*[70] the indictment for grand larceny alleged that the stolen property belonged to "Hattiesburg Hardware Stores." The proof tended to show the property belonged to the individual owner. The district attorney made no mention to amend, and the defendant neither filed any demurrer to the indictment nor made any request for a directed verdict. Also, there was no suggestion of a variance at any time between the allegations and the proof. The court held that the de-

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[65] 65 So. 2d 273 (Miss. 1953).
[66] 61 So. 2d 315 (Miss. 1952).
[67] 61 So. 2d 309 (Miss. 1952).
[68] 60 So. 2d 781 (Miss. 1952).
[69] 60 So. 2d 509 (Miss. 1952).
[70] 61 So. 2d 145 (Miss. 1952).

fendant could not now raise any objection on appeal but he must be considered as having waived any objection.

Under an indictment for receiving stolen goods, proof that defendant made two different purchases of stolen property on the same night made the indictment duplicitous. This defect could not be reached by demurrer, for it was not evident on the face of the indictment, but only after proof. Although more specific objection should have been made, a request for a peremptory instruction was sufficient. However, in *Hitt v. State*[71] when that question was raised, there was another reason for reversal: the trial judge refused counsel the privilege of record of evidence he expected to produce but for an objection sustained against it.

Erroneous Ruling. Where a trial court undertakes to correct an erroneous ruling which it has previously rendered, it should be made, as provided in Miss. Code § 1530 (1942), by written instruction on the law rather than by oral comment. *Sykes v. City of Crystal Springs, supra.*

Extradition. It was contended that extradition papers were defective because the writ for arrest recited that the petitioner was indicted at the July term, "19—1" instead of "1941." In this case the indictment had the proper date. The court held that the indictment prevails over recitations in the warrant to arrest as the writ is not a requisite part of the extradition papers.[72]

Betty Long
John White Valentine

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[71]63 So. 2d 665 (Miss. 1953).
[72]Tyler v. Pierce, *supra.*

RECENT DECISIONS

DAMAGES—SCARS OR DISFIGUREMENT—INSTRUCTIONS—INADEQUATE AWARDS

Plaintiff brough suit for damages for personal injuries received while a passenger for hire in defendant's taxicab. Relying on prior decisions[1] the lower court instructed the jury that "you cannot allow damages for physical pain and suffering and mental pain and anguish for any scars or disfigurement after plaintiff's physical suffering has ceased."[2] HELD: Judgment reversed as being inadequate and the cause remanded for a new trial on the question of damages. *Vascoe v. Ford,* 212 Miss. 370, 54 So.2d 541 (1951).

Decision of the subject case required a determination of whether the plaintiff was entitled to have submitted to the jury the question whether damages might be awarded by them for facial disfigurement. In the past, as pointed out by the court on a previous occasion,[3] damages for mental suffering have been very generally allowed in three classes of cases: (1) Where, by the merely negligent act of the defendant, physical injury has been sustained; and in this class of cases they are compensatory, and the reason given for their allowance by all the courts is that the one cannot be separated from the other. (2) In actions for breach of contract of marriage. (3) In cases of willful wrong, especially those affecting the liberty, character, reputation, personal security, or domestic relations of the injured party.

It should be noted that the holding in *Vascoe v. Ford,* in overruling prior Mississippi cases[4] which held that the court should instruct the jury not to allow for future humiliation from disfigurement in so far as such humiliation will be suffered after physical pain has ceased, did not go to the extent of permitting recovery for mental pain in contemplation of disfigurement which does not eventuate. The court simply held that "justice will be better promoted by allowing the jury to give due consideration and make an appropriate award of damages for permanent disfigurement and mutilation of the person. Such an award should be confined to the bounds of reason, taking into consideration the nature and character and location of the mutilation."[5]

George G. Currie

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[1]Pan-American Petroleum Corp. v. Pate, 157 Miss. 822 126 So. 480, *suggestion of error overruled,* 157 Miss. 822, 128 So. 870 (1930); Bonelli v. Braciere, 127 Miss. 556, 90 So. 245 (1922); Newman Lumber Co. v. Norris, 130 Miss. 751, 94 So. 881 (1922).

In the *Bonelli* case the court said, "We simply hold that when the physical suffering is at an end there can be no recovery for mental suffering or humiliation which may thereafter continue as the result of the physical disfigurement of body." It is to be noted, however, that in the *Newman Lumber Co.* case the court said, "We would not be understood as holding that the giving of such an instruction would be reversible error in any and all cases. . . ."

[2]In the *Newman Lumber Co.* case, *supra* note 1, it was held to be error to instruct the jury that assessing appellee's damages they should take into consideration, not only the physical and mental pain suffered by him, as well as any permanent injury, but in addition should take into consideration scars and disfigurement of appellee's person."

[3]Western Union Tel. Co. v. Rogers, 68 Miss. 748, 9 So. 823 (1891).

[4]Cases referred to in note 1, *supra,* and any others which may adhere to the rule therein announced.

[5]The decision of the court in *Koestler v. Burton,* 207 Miss. 40, 41 So.2d 362 (1949), perhaps gave an indication of the stand the court would take in the subject case. There it was stated that, ". . . while it may be conceded that the submission of 'permanent impairment' for the consideration of the jury may have authorized the jury to consider the physical disfigurement and altered facial appearance of the plaintiff, we do not feel justified in reversing the case on that account . . . for the reason that . . . we are unable to say that the verdict is excessive. . . ."

DOMESTIC RELATIONS—RIGHT OF ADOPTIVE PARENTS TO RECOVER UNDER WRONGFUL DEATH STATUTE

Adoptive parents brought suit under § 1453, MISS. CODE (1942), for the wrongful death of their adopted son, a minor. HELD: The word "parent" in the statute means the natural father or mother; therefore, adoptive parents could not maintain the suit. *Buroughs v. Oliver*, 64 So. 2d 338 (Miss. 1953).

The contention of the parents, hereinafter referred to as appellants, was that the effect of the adoption statute[1] of this state is to transfer all of the obligations and rights regarding the child from the natural parents to the adoptive parents. The right of action for wrongful death bestowed upon parents is purely statutory and in derogation of the common law; thus such statutes are strictly construed. The criterion generally applied in determining the meaning of the term "parents" in the wrongful death statutes of the various states is the effect of the adoption statute in force in the particular state.[2] The New Jersey court has held that "next of kin" means blood kin, and not the adopting parents, where the statute relative to adoption does not give any right to inherit from the adopted child.[3] The Kentucky adoption statute[4] provides that adoptive parents may inherit from an adopted child only such estate as he owned at the time of his death, exclusive of any that he may have inherited from blood kin; in view of such language, it has been held that only the natural parents may maintain suit for the wrongful death upon the theory that damages recovered under the death statute were never "property owned" by the defendant.[5] The Canadian view was expressed in *Blayborough v. Brantford Gas Company*.[6]

Recovery seems to be generally denied to adopting parents where the adopting statute gives them no right to inherit from the adopted child.[7]

There have been specific instances in which the adopting parent has been granted recovery. Where an adoption statute provides that, except as regards succession to property, all rights and duties of natural relation of child and parent shall, after adoption, exist between child and adopting parent, the adopting parent was allowed recovery on the basis that the right to recover damages from wrongful death was not a right to succession to property.[8]

Where the adopting statute specifically provides that the adopted child and the adopting parent are given the right to inherit from each other the courts have found no difficulty in allowing the adoptive parents to recover under wrongful death statutes.[9]

A seeming exception exists in the case of *McDonald v. Texas Employers' Ins. Asso.*[10] Suit was brought under the Workmen's Compensation Act. In the face of the adoption statute which denied the right of inheritance to adopting parent, the court allowed recovery by adopting parents. The court denied the contention that such

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[1]MISS. CODE § 1269 (1942).

[2]16 AM. JUR. DEATH, § 100.

[3]Heidcamp v. Jersey City, H. & P. Street R. Co., 69 N.J.L. 284, 55 Atl. 239 (1903).

[4]Ky. St. Supp. § 2072 (1926). Ky. Rev. St. § 391.080 (1946) now gives to adoptive parents the right to inherit from their adopted child the same as if the child were a natural one.

[5]Jackson v. Alexiou, 223 Ky. 95, 3 S.W. 2d 177 (1928).

[6]18 Ont. L. Rep. 243 (1909). In this case recovery was denied to a foster parent upon a construction of the word "parent" in the death statute. In the language of the court, "the law of England, strictly speaking, knows nothing of adoption, and does not recognize any rights, claims, or duties arising out of such a relation, except as arising out of an express or implied contract."

[7]Mount v. Tremont Lumber Co., 121 La. 64, 46 So. 103 (1908).

[8]Boutlier v. Malden, 226 Mass. 479, 116 N.E. 251 (1917).

[9]Carpenter v. Buffalo General Electric Co., 213 N.Y. 101, 106 N.E. 1026 (1914).

[10]267 S.W. 1074 (Tex. 1925).

provision of the adoption statute precluded recovery for the reason that "the Workmen's Compensation Law creates in favor of the beneficiary a distinct cause of action for compensation to repair the loss occasioned by the death of the employee upon whom the beneficiary was dependent." Recognizing that the wrongful death statute of Mississippi creates a similar new cause of action, it seems that the situations are identical.

Betty Long

INSURANCE—VALIDITY OF ORAL GIFT POLICY

Certificates of insurance on life of deceased were issued to him by virtue of his emploment and were delivered by him to his wife as a gift. The right to change beneficiaries was reserved. Deceased later had beneficiary changed in due form and new certificates were issued naming appellee as beneficiary. These new certificates were then presented to the appellee by deceased as a purported gift. The original certificates remained at all times in the exclusive possession and control of the wife. HELD: A policy of life insurance may be made the subject of a valid parol gift, provided all the essential elements of a gift are present. In making such a gift to the named beneficiary the expectancy or inchoate right of the beneficiary is merged into a vested right in the insurance, not subject to be defeated by a later attempt to change beneficiaries. *Stepson v. Brand,* 213 Miss. 826, 58 So. 2d 18 (1952).

The general, if not universal, rule is that a life insurance policy may be the subject of a valid gift in the same manner as any other chose in action.[1] Although the Mississippi Supreme Court had not heretofore decided the exact question involved, it had held that the insured had the right to assign by delivery, without formal assignment and without consent of the beneficiary, insurance policies which reserve to the insured the right to change the beneficiary.[2] The holding in the the instant case is merely an application of the same principle, treating a parol gift in the same manner as a parol assignment, and applying the logical corollary that once such a valid gift or assignment is completed, a subsequent attempt to change beneficiaries is of no effect.

Where insurance consists of certificates of membership in a beneficial association, the rules of which require a formal procedure to effectuate a change in beneficiaries, it has been held that such procedures must be substantially complied with in order to make a gift to someone other than the named beneficiary.[3] But where the insurance is with a so-called "old line company," it is generally held that the provisions of the policy requiring a formal procedure for the change of beneficiaries is solely for the benefit of the company.[4] This requirement is subject to waiver by the company, and payment of the proceeds of a policy into court is proof of such waiver.[5]

Some jurisdictions have held that a parol assignment and delivery of the policy is not enough to consummate a gift of an insurance policy, but that there must be

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[1]McEwen v. N.Y. Life Ins. Co., 42 Cal. App. 133, 183 Pac. 373 (1919); Miller v. Gulf Life Ins. Co., 152 Fla. 221, 12 So. 2d 127 (1943); Peel v. Reibel, 205 Minn. 474, 286 N.W. 345 (1939); Guardian Life Ins. Co. v. Mareczko, 114 N.J.Eq. 369, 168 Atl. 642 (1933); John Hancock Life Inc. Co. v. Sandrisser, 95 N.Y. Sec. 2d 399 (1950).

[2]Christian v. Merchants' Nat'l Bank, 188 Miss., 586, 195 So. 485 (1940).

[3]Ireland v. Ireland, 42 Hun. 212, 5 N.Y.S.R. 89 (1886); see Note, 47 A.L.R. 738,743.

[4]Peel v. Riebel, *supra* note 1; Traveller's Ins. Co. v. Grant, 54 N.J.Eq. 208, 22 Atl. 1060 (1896); Opitz v. Karel, 118 Wis. 527, 95 N.W. 948 (1903).

[5]Glen v. Aetna Life Ins., Co., 573 Ohio App. 452, 556 N.E.2d 951 (1944); Riley v. Wirth, 313 Pa. 362, 169 Atl. 139 (1933); even though the policy contains an express provision that the insured reserves the right to change beneficiaries, this is an agreement between the insurer and insured and may be waived by the insured. Mahoney v. Crocker, 58 Cal.App.24 196, 136 P.2d 819 (1943); Miller v. Gulf Life Ins. Co., *supra* note 1.

a written assignment.[6] Nevertheless, virtually all jurisdictions now hold that a parol assignment coupled with delivery is sufficient to constitute a gift without a written assignment,[7] and actual delivery is not always required.[8] However, it is generally held that proof of the gift should be clear and convincing so as not to open the way to such fraud as might arise out of the mere possession of a pretended gift.[9]

George W. Rogers, Jr.

Judgment Lien—Execution—When Does Lien Attach To Personal Property

Appellant obtained a judgment for $2,227.01 against Bracey on August 9, 1949, which was duly enrolled and entered upon the judgment roll on August 18, 1949. On January 2, 1950 appellant brought suit against Bracey and Clark and alleged that subsequent to the enrollment of his judgment Bracey sold and delivered to Clark fifteen bales of cotton. Appellant further alleged that he had a lien on the cotton by virtue of his said judgment and enrollment thereof and that he was entitled to recover the value of the cotton. Held: As to personal property, a judgment lien does not attach to the property until execution is issued upon it. *Willis Hardward Co. v. Clark,* 61 So.2d. 441 (Miss. 1952).

Justice Roberds in his dissenting opinion[1] states that the decision in this case destroys the effect of the judgment enrollment statute.[2] It also appears that the effect of the decision is to change the nature of the statute, in so far as is related to personal property, from one of a judgment lien into an execution lien.[3] Prior cases in interpreting the statute, have held that the judgment lien attaches at the time of rendition of the judgment,[4] but there are a few cases to the contrary.[5]

A purchaser of property, either real or personal, is deemed to have knowledge of the lien on the property, if the statute has been complied with by the judgment creditor.[6] In most jurisdictions if such a purchaser removes the property from the county wherein the judgment is enrolled, so that the judgment creditor does not know

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[6]Steele v. Gatlin, 115 Ga. 929, 42 S.E. 253 (1902); Weaver v. Weaver, 182 Ill. 287, 55 N.E. 338 (1898).

[7]Mahoney v. Crocker, *supra* note 6; Miller v. Gulf Life Ins. co., *supra* note 1; Bank v. Thomas, 151 Md. 241, 134 Atl. 210 (1926); Guardian Life Ins. Co., v. Mareczko, *supra* note 1.

[8]Mutual Life Ins. Co. of N.Y. v. Holley, 280 N.Y. 330, 20 N.E.2d 776 (1939). In Ratsch v. Rengel, 180 Md. 196, 23 Atl. 2d 680 (1942), the court said: "But actual delivery is not required, and evidence of delivery may consist of acts, or words, or both."

[9]Jennings v. Provident Life & Acc. Ins. Co., 246 Ala. 689, 22 So.2d 319 (1945); First Nat'l Bank v. Thomas, *supra* note 8.

[1]Willis Hardware Co. v. Clark, 61 So.2d. 441, 443 (Miss. 1952).

[2]Miss. Code § 1555 (1942) provides in part, "A judgment so enrolled shall be a lien upon and bind all the property of the defendant within the county where so enrolled, from the rendition thereof, and shall have priority according to the order of such enrollment, in favor of the judgment creditor, . . ."

[3]Reconstruction Finance Corporation v. Maley, 125 F.2d. 131 (7th Cir. 1942); Goodyear Tire & Rubber Co. vs. Daniel, 72 Fla. 489, 73 So. 592 (1916); Love v. Williams, 4 Fla. 126 (1851).

[4]Kalmia Realty & Ins. Co. v. Hopkins, 163 Miss. 556, 141 So. 903 (1932); Minshew v. Davidson, 86 Miss. 354, 38 So. 315 (1905); Clark v. Duke, 59 Miss. 575 (1882).

[5]Harris v. Worsham, 164 Miss. 74, 143 So. 851 (1932); Candler v. Cramwell, 101 Miss. 161, 57 So. 554 (1911); Simpson v. Smith Son's Gin & Machine Co., 755 Miss. 505, 22 So. 805 (1897); Josselyn v. Stone, 28 Miss. 753 (1855); Stevens v. Mangum, 27 Miss. 481 (1854).

[6]Haynes Mercantile Co. v. Bell, 163 Ala. 326, 50 So. 311 (1909); Gerlach-Barklow Co. v. Ellett, 145 Miss. 60, 111 So. 92 (1927); Mitchell v. Wood, 47 Miss. 231 (1872); Josselyn v. Stone, *supra* note 5; Phillips v. Lane, 4 How. (Miss.) 122 (1839); 34 C.J., Judgments § 463.

its whereabouts, or otherwise destroys the property subject to the lien then he is personally liable for the amount of the lien.[7]

The intention of the legislature in enacting the statute has been established[8] to be for the protection of the purchaser in buying from the judgment debtor. Therefore it would seem that such a purchaser, having knowledge of the lien, should not be exempt from liability where by his own acts he has converted the property to his own use.[9]

A judgment debtor should not be allowed to defeat a judgment lien by alienating the property to a third person.[10]

Section 1555 should be construed to apply to both real and personal property[11] and there should be no confusion in so applying this section when it is read in the light of Miss. Code § 692 (1942).[12]

In the opinion of this writer the better rule is that established in the case of *Stuart v. Pickett*,[13] which is similar to the case in question. In that case the judgment creditor was allowed to recover the amount of his judgment from a third party when there had been no execution. The Court stating "a judgment lien on timber in equity, follows the proceeds of the sale thereof."

Stone D. Barefield

Monopoly — Validity of Newspaper Publisher's Sale of Advertising Through Tying Arrangement

Newspaper publisher of morning Times-Picayune and evening States required purchasers of space for general display and classified advertising to purchase combined insertions appearing in both papers, thereby refusing to permit advertising to appear in one paper only.[1] Held: The Times-Picayune sold only forty per cent of the total volume of the general and classified lineage of the three papers; therefore, it did not have such a dominant position as to make the unit plan a violation of the Sherman Act.[2] *Times-Picayune Publishing Co. v. United States*, 73 Sup. Ct. 872 (1953).

Although the state courts, with one exception,[3] have not seen fit to view a newspaper as a special subject of the state police power,[4] even the Supreme Court in the instant case reveals an awareness of the unique position of the daily newspaper. Justice Clark deplores the drastic economic decline suffered by daily newspapers in recent

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[7]Connecticut General Life Ins. Co. v. Smith, 226 Ala. 142, 145 So. 651 (1932); Barland v. Atlantic Compress Co., 200 Ala. 39, 75 So. 351 (1917); Clark v. Johnson, 7 Ala. App. 507, 61 So. 34 (1913); Baker v. Allen, 161 Ala. 288, 49 So. 847 (1909); Haynes Mercantile Co. v. Bell, *supra* note 6; 31 Am. Jur., Judgments § 303.

[8]Josselyn v. Stone, *supra* note 5.

[9]Haynes Merchantile Co. v. Bell, *supra* note 6; Beebe Stave Co. v. Austin, 92 Ark. 248, 122 S.W. 482 (1909).

[10]Mitchell v. Wood, *supra* note 6; 49 C.J.S., Judgments § 488.

[11]Bank of Monticello v. Powell Co., 159 Miss. 183, 130 So. 292 (1930); Gerlach-Barklow Co. v. Ellett, *supra* note 6.

[12]"The term 'property', when used in any statute, includes personal property as defined in section 690 and also every estate, interest, and right, in lands tenements, and hereditaments."

[13]193 Miss. 455, 10 So.2d 207 (1942).

[1]The 1950 average daily circulation of the Times-Picayune the sole morning news paper, was 188,402. The 1950 average daily circulation of the States was 105,235 while its independent competitor, the evening Item, served a daily average of 114,660.

[2]26 Stat. 209 (1890), 15 U.S.C.s §§ 1, 2 (1946), as amended, 50 Stat. 693 (1937).

[3]Uhlman v. Sherman, 22 Ohio N.P.N.S. 225, 31 Ohio Dec. N.P. 54 (1919).

[4]Shuck v. Carroll Daily Herald, 215 Iowa 1276, 247 N.W. 813 (1933); Chronicle and Gazette Publishing Co. v. Attorney General, 94 N.H. 148, 48 A.2d 478 (1946).

years and implies that the growth of the number of newspapers should be encouraged.[5]

The application of the rule of reason[6] to refusals to sell prevents them from being viewed as violations of the Sherman Act, unless such refusals have been the result of concerted action or conceived in monopolistic purposes;[7] however, selling goods on condition that the purchaser not deal in the goods of a competitor is detrimental when it substantially lessens competition.[8] This impliedly eliminates the use of the "tying clause" since through its use the seller forces the buyer to use the former's product and abstain from the use of that of his competitor. When a single seller achieves a dominant market position, his refusal to sell is equally as detrimental as that of a group boycott.[9] The Clayton Act[10] is violated when a tying clause is used by a seller having monopolistic control of the market or restraining a substantial volume of commerce.[11] The Sherman Act is violated when both conditions are met.[12]

The result in this case depended in large measure on whether or not the Times-Picayune occupied a dominant position in the newspaper advertising market in New Orleans. The Court, in reversing the District Court's finding of fact that the Times-Picayune was dominant, rested its decision on the fact that dominance in advertising market, not in readership, would be decisive.[13]

Even conceding that there might be some doubt as to the dominant position of the Times-Picayune, there is another cogent reason why the decision in the instant case is surprising. According to the federal rule[14] the appellate court will not reverse a finding of fact of the District Court unless clearly erroneous.[15]

The Supreme Court not only chose to "hack through the jungle" whose growth was nurtured by its own cultivation; it ignored the obvious avenue of exit leading to the reasonable finding that the Times-Picayune was using its dominance in one field

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[5]Of the 598 daily newspapers which broke into publication between 1929 and 1950, thirty-eight per cent were still being published when that period closed. Forty-six of these entering dailies, however, encountered the competition of established dailies which utilized unit rates similar to that used by the Times-Picayune; by 1950, of these forty-six, forty-one had collapsed.

[6]Standard Oil of New Jersey v. United States, 221 U.S. 1 (1911); United States v. Associated Press, 52 F. Supp. 362 (S.D. N.Y. 1943), *aff'd*, 236 U. S. 1 (1944).

[7]Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), declared invalid a price fixing system whereby manufacturers attempted to fix all wholesale and retail prices; however, United States v. Colgate & Co., 250 U.S. 300 (1919) seemingly overruled this decision and gave special immunity to refusals to sell predicated on tacit agreements rather than express contracts. The District Court attempted to follow the *Colgate* case and held that resale price maintenance had been reinstated, but the case was reversed. United States v. A. Schrader's Sons, Inc., 252 U. S. 85 (1920), *reversing* 264 Fed. 175 (N.D. Ohio 1919).

[8]Lorain Journal Co. v. United States, 342 U. S. 143 (1951); Standard Oil Co. of California v. United States, 337 U.S. 292 (1949).

[9]United States v. Griffith, 334 U.S. 100 (1948).

[10]38 Stat. 731 (1914), 15 U. S. C. § 14 (1946).

[11]International Salt Co. v. United States, 332 U.S. 392 (1947).

[12]*Ibid.*

[13]The Court failed to note that lineage is important only when related to readership. The Court contended that the Times-Picayune would control only one-third of the advertising lineage in a purely competitive market composed of fungible readership. Since the Times-Picayune actually controlled only forty per cent, the Court concluded that it was not dominant. This overlooks two factors: (1) Morning and evening readership may not be fungible since they may differ in quality. (2) If the tying plan were perfectly effective, the Times-Picayune would have only one-half the market; thus, the actual figure is only ten per cent short of complete success.

[14]Fed. R. Civ. P. 52 (a).

[15]Adamson v. Gilliland, 242 U. S. 350 (1917); Lawson v. United States Mining Co., 207 U.S. 1 (1907).

in order to enhance the position of its affiliate in another field. That even the Court may have felt some doubt about the correctness of its holding is illustrated by the statement that the instant decision was based only on the particular situation there involved and did not determine that unit arrangements are lawful in other proceedings.

William H. Beck, Jr.

TORTS—PROXIMATE CAUSE IN NEGLIGENCE CASES

A bus owned by defendant bus company stopped to take on passengers who were waiting on the right shoulder of the highway. In stopping, the bus pulled as far off the paved portion of the highway as practical, including sound and safe shoulders, but failed to pull far enough off the pavement to leave a clear and unobstructed portion of the highway twenty feet in width, as required by statute.[1] A seed truck, driven by a second defendant, which had been following the bus at a distance of 300 feet, came to a stop in the right lane of the highway behind the bus. A loaded cattle truck, driven by a third defendant, which had been following the seed truck at a distance of 68 feet, swerved into the left lane of the highway when the driver applied the brakes, colliding head-on with an automobile proceeding in the opposite direction. Plaintiff's decedent, the driver of the automobile, was killed in the collision. Plaintiff brings this action for the wrongful death of deceased. HELD: Deceased's death was proximately caused by the negligence of defendant bus company in stopping its bus, and the bus company is liable for the injuries proximately caused by its acts, even though its negligence was not the sole proximate cause of the accident. *Continental Southern Lines v. Klaas*, 65 So. 2d 575 (Miss. 1953), *suggestion of error overruled*, 65 So. 2d 833 (Miss. 1953).*

The question of proximate cause has long been one of the most vexing in the law of torts. This is true primarily because no one has as yet been able to say, with any degree of precision, what proximate cause is. In attempting to define proximate cause the Supreme Court of Mississippi once said, "Without attempting to define proximate cause in such terms as will be applicable to all states of fact—for to do so is practically impossible—it will be sufficient to say. . . ."[2] Thus, the court, by its own admission, propounds a definition of the concept of proximate cause which does not define. It fails to define because, as stated by the court,[3] its subject is impossible of definition. It is not surprising that the use of such a nebulous concept has given rise to endless confusion.

The two prevailing views with respect to determination of liability in negligence cases are well stated in the opinion of Cardozo, and the dissenting opinion of

*Since this comment was submitted to the printer a *Second* suggestion of error has been filed and overruled. 67 So. 2d 256 (1953). See Rules of Supreme Court, rule 14 (3).

[1]MISS. CODE § 8215 (1942).

[2]Cumberland Telephone & Telegraph Co. v. Woodham, 99 Miss. 318, 54 So. 890 (1910). The court's complete definition was: "Without attempting to define proximate cause in such terms as will be applicable to all states of fact—for to do so is practically impossible—it will be sufficient to say that the negligent act of a person, resulting in injury, is the proximate cause thereof, and creates liability therefor, when the act is of such character that, by the usual course of events, some injury, not necessarily the particular injury, or injury received in the particular manner complained of, would result therefrom, provided the attendant circumstances are such that an ordinarily prudent man ought reasonably to have anticipated that some injury would probably result from the act done." This definition has been quoted with approval by the Mississippi court in several late cases. Continental Southern Lines v. Klaas, *supra;* Southern Pine Electric Power Ass'n v. Denson, 214 Miss. 397, 57 So.2d 859 (1952); Belk v. Rosamond, 213 Miss. 633, 57 So. 2d 461 (1952); Planter's Wholesale Grocery v. Kincade, 210 Miss. 712, 50 So. 2d 578 (1951).

[3]Cumberland Telephone & Telegraph Co. v. Woodham, *supra* note 2.

Andrews, in the famous *Palsgraf*[4] case. Cardozo, in the majority opinion, held that in order for a defendant's conduct to become actionable, it must violate a duty imposed upon the defendant with respect to the injured interest of the plantiff.[5] "Proof of negligence in the air, so to speak, will not do."[6] In applying this formula, the following questions must be answered: Did the law impose a duty upon the defendant with respect to the interest of the plaintiff which has been invaded?[7] If so, did the defendant violate that duty? If either of these questions is answered in the negative, there is no negligence, hence, no liability. If both answers are in the affirmative, then the defendant was negligent. In order for his negligence to be actionable, however, it must be found that the defendant's conduct was a substantial factor in the occurence giving rise to the cause of action.[8] Observe that negligence toward the injured interest of the plaintiff must be found before the question of causation becomes important.

The opposing view, as announced by Andrews in his dissent,[9] is a much more simple concept. Under this approach, the defendant is considered as owing a duty to society as a whole to protect it from harm resulting from his negligent acts, and if anyone is injured as a proximate result of his negligence, he is liable. No attempt is made to define any special duty owing to the plaintiff. If the conduct of the defendant is negligent, all that is necessary in order to impose liability upon him is to determine that his negligence was the proximate cause of plaintiff's injury.[10]

It is submitted that the problem in the instant case was one of duty, not of causation. It can hardly be contended that the stopping of defendant's bus was not a substantial cause of the fatal collision. Therefore, the true basis for decision lies in a consideration of whether or not the law imposed upon the defendant any duty with respect to the injured interest of plaintiff's decedent; namely, his right to proceed along the highway in safety; and whether or not defendant's conduct violated that duty.[11] Possibly the court has reached the correct result through the use of the

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[4]Palsgraf v. Long Island R. R., 248 N.Y. 339, 162 N.E. 99 (1928). Defendant's servants, while assisting a passenger to board a train, dislodged a package containing, unknown to them, fireworks. The package, upon striking the ground, exploded, causing some scales to fall and injure the plaintiff, who was standing many feet away. The court held that defendant had violated no duty with respect to the injured interest of the plaintiff.

[5]This view has been adopted by the Restatement, RESTATEMENT, TORTS § 281 (1934). Considerable support for it is to be found in the decisions of the Mississippi court. Sturdivant v. Crosby Lumber & Manufacturing Co., 65 So.2d 291 (Miss. 1953); Paramount-Richards Theatres v. Price, 211 Miss. 879, 53 So.2d 21 (1951); Vincent v. Barnhill, 203 Miss. 740, 34 So.2d 363 (1948); Wright v. I. C. R. R., 196 Miss. 150, 16 So.2d 381 (1944); Mauney v. Gulf Refining Co., 193 Miss. 421, 9 So.2d 780 (1942).

[6]POLLOCK, THE LAW OF TORTS, 468 (13th ed. 1929).

[7]The answer to this question will, of course, involve a determination of what duty, if any, was imposed upon the defendant.

[8]RESTATEMENT, TORTS § 432 (1934).

[9]Palsgraf v. Long Island R. R., *supra* note 4.

[10]The Andrews formula is supported by two rather well known English decisions: Heaven v. Pender [1883] 11 Q.B.D. 503; *In re* Polemis & Furness, Withy & Co., Ltd., L.R. [1921] 3 K.B. 560. The Mississippi court has applied this theory on numerous occasions. *e.g.*, Continental Southern Lines v. Klaas, *supra* note 2; Southern Pine Electric Power Ass'n v. Denson, *supra* note 2; Belk v. Rosamond, *supra* note 2; Planter's Wholesale Grocery v. Kincade, *supra* note 2; Gulf Refining Co. v. Brown, 196 Miss. 131, 16 So.2d 765 (1944); Gulf Refining Co. v. Williams, 183 Miss. 723, 185 So. 234 (1938); Soloman v. Continental Baking Co., 172 Miss. 388, 160 So. 732 (1935); Public Service Corp v. Watts, 168 Miss. 235, 150 So. 192 (1933); Cumberland Tel. & Tel. Co. v. Woodham, *supra* note 2; Yazoo City v. Birchett, 89 Miss. 700, 42 So. 569 (1906).

[11]It is interesting to note that on the same day the opinion in the instant case was handed down, the Mississippi court applied the Cardozo formula in deciding another negligence case. Sturdivant v. Crosby Lumber & Manufacturing Co., *supra* note 5.

proximate cause formula, but it is submitted that a more logical opinion could have been written and the ratio decidendi more easily understood through the application of the formula suggested by Cardozo.[12]

J. David Orlansky

TORTS — RECOVERY FOR MENTAL SUFFERING UNACCOMPANIED BY PHYSICAL INJURY

Plaintiff sued defendant for damages to his car and for mental shock or nervous injury resulting from a collision between plaintiff's automobile and defendant's streetcar. The deposition of the plaintiff's neurologist and the testimony of the plaintiff showed no relation between the alleged relaxation of the plaintiff's hands, causing him to drop things, and the trauma received in the accident. HELD: Recovery cannot be had for mental pain or suffering caused by shock, not traceable to physical injuries. *Darrin v. Capital Transit Co.*, 90 A. 2d 823 (D.C. 1952).

The general rule relied on in this case is that damages resulting from mental pain and suffering are recoverable only where there has been physical injury.[1] Such rule also is applicable in Mississippi.[2] There exist a number of exceptions to the general rule and recovery is permitted in cases where infliction of mental distress is shown or is reasonably to be inferred, as for example, in cases of breach of contract to marry,[3] in cases of seduction, slander, malicious prosecution or arrest,[4] and in those cases where the issue is the right of privacy.[5] Many courts have refused recovery if the harm is not immediate, but follows subsequently as a result of plaintiff's fright or shock as in cases of miscarriage, unless there has been some "impact" on the plaintiff's person,[6] or trespass to the property of the plaintiff or where a duty is owed by the defendant not to breach it.[7] A slight but increasing majority of courts have repudiated the requirement of "impact" and have regarded the physical consequences themselves or the circumstances of the accident as sufficient guarantee that the mental disturbance is genuine.[8] The most trifling type of impact, which more or less guarantees that the

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[12]For more detailed discussions of the problem to which this article is devoted see: GREEN, THE RATIONALE OF PROXIMATE CAUSE (1927); Schermehorn, *Is a Negligent Defendant Liable for Unforseeable Harm Proximately Ensuing*, 1 MISS. L. J. 187 (1928); Venable, *Proximate Cause and Effects*, 19 MISS. L. J. 183 (1948); Green, *The Palsgraf Case*, 30 COL. L. REV. 789 (1930).

[1]Perry v. Capital Traction Co., 32 F. 2d 938 (D.C. Cir. 1929).

[2]Doherty v. Miss. Power Co., 178 Miss. 204, 173 So. 287 (1936).

[3]Thrush v. Fullhart, 230 Fed. 24 (4th Cir. 1915).

[4]BOHLEN, TORTS 275 (1926); Atkinson v. Dixie Greyhound Lines, 143 F. 2d 477 (5th Cir. 1944), *cert. denied*, 323 U. S. 758 (1944); State Life Ins. Co. of Ind. v. Hardy, 189 Miss. 266 195 So. 708 (1940); Kroger Grocery & Baking Co. v. Harpole, 175 Miss. 227, 166 So. 335 (1936); Hodges v. Cunningham, 160 Miss. 576, 135 So. 215 (1931); Stone v. Bang, 153 Miss. 892, 122 So. 95 (1929); Tribble v. Y. & M. V. Ry., 103 Miss. 1, 60 So. 2 (1912); Mask v. Rawls, 57 Miss. 271 (1879); Ellington v. Ellington. 47 Miss. 329 (1872); Tillotson v. Currin, 176 N. C. 479, 97 S. E. 395 (1918).

[5]ELDRIDGE, MODERN TORT PROBLEMS 75-83 (1941); Emke v. DeSilva, 293 Fed. 17 (8th Cir. 1923); Gill v. Curtis Pub. Co., 231 P. 2d 565 (Calif. 1951); Pavesich v. New England Life Ins., 122 Ga. 190, 50 S. E. 68 (1904); Eich v. Porks Dog Food Co., 347 Ill. App. 293, 106 N. E. 2d 742 (1952); Foster-Millburn Co. v. Chinn, 134 Ky. 424, 120 S. W. 364 (1909).

[6]PROSSER, TORTS 214 (1941); Blessington v. Autry, 105 N. Y. S. 2d 953 (1951); Mitchell v. Rochester Ry., 151 N. Y. 107, 45 N. E. 354 (1896); Ewing v. Pittsburgh & St. L. Ry., 147 Pa. St. 40, 23 Atl. 340 (1892).

[7]Bowman v. Williams, 164 Md. 397, 165 Atl. 182 (1933); Green v. Shoemaker & Co., 111 Md. 69, 73 Atl. 688 (1909); Barbee v. Reese, 60 Miss. 906 (1883); Hambrooks v. Stokes Bros., 1 K. B. 156 (1925).

[8]PROSSER, TORTS 215 (1941); Orle v. Conn. Co., 128 Conn. 231, 21 A. 2d 402 (1941); Freedman v. Eastern Mass. Ry., 299 Mass. 246, 12 N. E. 2d 739 (1938); Comstock v. Wilson, 257 N. Y. 231, 177 N. E. 431 (1931).

claim is not based on imagination or malingering now suffices to by-pass the "impact" theory and permit recovery where the mental distress causes physical harm[9] and even where no physical harm results.[10] By statute in all jurisdictions workmen's compensation laws exist and recovery is permitted for physical harm resulting to plaintiff, provided such suffering arises out of the plaintiff's employment.[11] It has been held that a nervous shock arising out of and in due course of employment is a compensable injury within the meaning of a workmen's compensation statute.[12] Courts in allowing recovery where there has been no impact follow the exceptions, but not to the extent of allowing recovery for mental distress without physical harm other than through the devices of the exceptions.

In answering the topic question, it is obvious that the general rule must be qualified since there are so many exceptions. The growing conviction expressed in appellate opinions is that "there are a lot of situations in the twentieth century where severe emotional disturbances should be compensated."[13]

Had the plaintiff in the principal case instituted his cause of action for physical harm resulting to his hands whereby he was unable to control them and had he shown the shock he received to have been the causal connection between the accident and the resultant injury, he should have been allowed recovery. The plaintiff's failure to present evidence of the relation between the shock received in the accident and the resulting physical harm was fatal to his cause.

John E. Mulhearn

WORKMEN'S COMPENSATION—SCOPE OF EMPLOYMENT

A claimant, employed to operate a gin and to do odd repair jobs during the off season, was directed by one of his employers to put up political signs and was electrocuted while hanging one from an electric pole. HELD: injured within scope of employment. *National Surety Corp. v. Kemp,* 64 So. 2d 723 (Miss. 1953), *suggestion of error overruled,* 65 So. 2d 840 (Miss. 1953).

A house wife, who kept books at home for her employer for whom she worked in the daytime, was injured when she moved a shotgun from a couch before sitting there to do the bookkeeping. HELD: injured within scope of employment. *Joe Ready's Shell Station & Cafe v. Ready,* 65 So. 2d 268 (Miss. 1953), *suggestion of error overruled.*

In these two cases the Mississippi Supreme Court affirms its liberal position on granting compensation under the Mississippi Workmen's Compensation Law.[1] The decision in the *Ready* case originally came from an equally divided court;[2] however, all justices participated upon suggestion of error, and the award was affirmed 5-4.[3]

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[9]ELDRIDGE, MODERN TORT PROBLEMS 72, 73 (1941); Orle v. Conn. Co., *supra* note 8; Block v. Pascucci, 111 Conn. 58, 149 Atl. 210 (1930); Porter v. Delaware, L. & W. Ry., 73 N. J. L. 405, 63 Atl. 860 (1906).

[10]Singer Sewing Machine Co. v. Stockton, 171 Miss. 209, 157 So. 366 (1934); Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S. E. 680 (1928).

[11]MISS. CODE §§ 6998-01 to 6998-59 (1942).

[12]American Smelting & Refining Co. v. Industrial Comm., 59 Ariz. 87, 123 P. 2d 163 (1942).

[13]ELDRIDGE, MODERN TORT PROBLEMS 101 1941); Vascoe v. Ford, 212 Miss. 370, 54 So. 2d 541 (1951), over-ruling prior decisions and allowing damages for disfigurement or mutilation of body resulting from injuries to the person.

[1]MISS. CODE Sec. 6998-01 *et seq* (1942).

[2]Hall, J., took no part.

[3]For affirmance of compensation: Holmes, with whom concur Lee, Arrington, Ethridge, and Hall. For reversal: Roberds, with whom concur McGehee, Kyle, and Lotterhos.

The *Kemp* decision originally had a dissent by Roberds, J., in which he seemed not to question the scope of employment, but rather questioned the coverage by the insurer where the injury was caused by a hazard so far removed from the coverage of ginning operations in an enlarged scope of employment. Upon suggestion of error, two other justices joined in the dissent with essentially the same view.[4]

The knowledge of the insurer of the work being done at home is mentioned in the facts of the *Ready* case; if such knowledge is in any manner determinative of scope of employment, is it to be said that coverage is co-extensive with liability[5] (scope of employment) or that liability (scope of employment) is co-extensive with coverage? Perhaps the majority mentions this knowledge of the insurer to justify the extension of the coverage to such an unforseen hazard in answer to the critical dissent in the *Kemp* case.

Although the court avers that the *Ready* decision was reached without resort to the liberal construction rule,[6] its sole authority is *Proctor v. Hoage,*[7] a 1935 case which involved injury *going* home and in a 3-2 decision. The minority, there, admitted compensation if the "claimant had been injured while at home doing the work."[8]

The position of the *Ready* minority is that under whatever circumstances Mrs. Ready removed the gun its removal could never be more, or less, than a household chore. The Florida case cited[9] sustains this view that compensation could be refused when the injury occurred, even though while incidentally working for hire, if it was in the course of some task the claimant would perform *in any event,* regardless of the employment. The "liability by choice of seats" criticism of the dissent [10] is hardly persuasive, but strength does lie in its emphasis of the act's purpose to protect workers from the hazards of industry.

John White Valentine

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[4]Roberds, Lotterhos, and McGehee dissent.

[5]Miss. Code § 6998-39 (1942).

[6]Deemer Lumber Company v. Hamilton, 211 Miss. 673, 52 So. 2d 634 (1951); Brookhaven Steam Laundry v. Watts, 241 Miss. 569, 39 So. 2d 294 (1952).

[7]81 F. 2d 555 (D.C. Cir. 1935).

[8]*Supra* note 7, p. 559.

[9]Glasser v. Youth Shop, Inc., 54 So. 2d 686 (Fla. 1951); an employee doing bookkeeping at home, carrying books down stairs to eat his breakfast and then to carry them on to his shop, fell and was injured. "The appellant was not on the stairs because of his employment; he would have been there in any event, regardless of whether he had brought his work home from the store."

[10]"This one is just too fantastic," Joe Ready's Shell Station & Cafe v. Ready, 65 So. 2d 271, 272 (Miss. 1953). Perhaps, but in Security Union Insurance Company v. McClurkin, 35 S. W. 2d 240 (Tex. Civ. App. 1930), when a sales superintendent, after answering a call from his employer on a company-installed phone at his home, stepped on a needle and ran it through his foot he was compensated.

RECENT BOOKS

HISTORY OF AMERICAN BAR ASSOCIATION. By Edson R. Sunderland, with conclusion by William J. Jameson. Reginald Heber Smith, 1953. Pp. 251. $3.00.

Have you ever wondered how an idea came to grow into an international institution? This book gives you an insight into the answer to that question. Beginning very logically at the beginning, the author, Edson R. Sunderland, who is presently a professor at the University of Michigan Law School, takes the reader step by step from 1878 when Simeon E. Baldwin of Connecticut was attempting to originate an annual meeting of attorneys from all parts of the United States for the purpose of a comparison of views and friendly intercourse, through the birth pains and growing pains of the American Bar Association until he reaches today. In the concluding chapter, William J. Jameson, a practicing attorney from Billings, Montana, recently installed as President of the American Bar Association, provides an interesting discussion on the Committee on Scope and Correlation of Work and Its Program. All statements are supported by citation to the *American Bar Association Reports,* so that anyone who desires to pursue the study of any particular item in more detail may do so with a minimum of effort.

An item of particular interest to us in Mississippi is the fact that at the initial organizational meeting on August 21, 1878, at Saratoga, New York, Louisiana had the most members present and Mississippi shared the spotlight with Maryland for fourth place. The District of Columbia and twenty-eight states were represented at the organizational meeting.

For convenience of presentation the author has divided the history into three periods. The first period, which he calls the "Saratoga Era," embraces the first twenty-five years, from the organization of the American Bar Association in 1878 to the year 1902. This was the period when the association was establishing itself as a national organization; and its name is taken from the fact that the association met every year, or every alternate year, at Saratoga Springs, New York. It was a period of conservative and leisurely activity. The second period, which is called the "Era of National Expansion," covers the thirty-three years from 1902, when Saratoga Springs, New York, was abandoned as a meeting place, until the reorganization of the association on a federated basis in 1936. This was the period during which the association moved from city to city throughout the United States, making its regional appeals for the support of the bar in its rapidly expanding program for the better administration of justice and for better laws. It was a period of tremendous growth, both in the association's membership and in the variety of its activities. The third period, which is called the "Era of Federation," begins in the year 1936 with the organization of the association and covers the interval through the year 1950. This is the period during which the association became spokesman for the American lawyer and it is still in the process of making its history.

For a book concerning itself solely with such a dry subject as organization (this history is written primarily along organizational lines) this must be recommended as an excellent work. It provides the reader with a general insight into the organization of the American Bar Association; how and why it came to be organized; how and why it met each organizational problem, discussing stumbling blocks and difficulties encountered in achieving such organization; and why it became necessary that it change to the federated association that it is today. Its present organization and objectives, of necessity, point the way toward the course it will take in the immediate future. Anyone who desires background material concerning the organization and general program of the American Bar Association will find this book a great timesaver.

*Frank E. Shanahan, Jr.**

JURISPRUDENCE: MEN AND IDEAS OF THE LAW. By Edwin W. Patterson. The Foundation Press, Brooklyn, 1953. Pp. 659. $7.50.

This comprehensive volume is the product of thirty years of collection and study of the predominating jurisprudential ideas of English and American law. It is a student textbook and was first published in mimeographed form in 1940. It was expanded in mimeographed form in 1946, 1949 and 1951.

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*Attorney at Law, Vicksburg, Mississippi.

Though this treatise is primarily written for the benefit of law students, yet because of its fundamental nature, the width of its scope and the future results of the operating principles presented therein it is or should be of interest to the law professor, practitioner and jurist.

The author, who is the Cardozo Professor of Jurisprudence of Columbia University, has divided this work into five basic parts, consisting of nineteen chapters. These parts are:

(1) The Providence of Jurisprudence;

(2) What is Law;

(3) What is the Law;

(4) What Should be the Law; and

(5) The Judicial Process.

The introductory part of this volume presents summarily the relations of jurisprudence to the branches of philosophy and to the social sciences. It presupposes that the student is well grounded in the basic foundations of philosophy. The province of jurisprudence is tersely outlined as to its various meanings from an internal and external standpoint. The operation of philosophy in the law and the working relationship of jurisprudence and the sciences are succinctly discussed. Considering the scope of these topics and the countless volumes which have been written on the various subdivisions thereof, such as anthropology, political science and economics, the treatment and analysis necessarily is very general and limited. Propriety demands that leniency shall govern when passing review upon such a stupendous undertaking, but one cannot help but candidly wonder if the average law student is not frustrated when he contemplates this explanation of the province of jurisprudence, and questions the wisdom of his decision to become a lawyer.

In Part Two, What is Law, the author "gets down to cases." Here the primary concepts of law are considered. The various distinctions in meaning are shown and a working definition is derived from a contemplation of our (a) institutional, (b) imperative, and (c) social control conceptions of law. The generality of law is viewed from two angles—its functional and logical aspects. The other two basic factors considered in Part Two are: first, the normative character of law, involving the meaning of rule, its broader conception norm and to whom legal norms are addressed; and, second, the authority and sanction of law. Under the above mentioned concept of law the State is considered as the creator of the authority and sanction of law.

An analysis of the variations of the authority of law and the mutations in the "private" field and the unfledged international sphere terminate Part Two and provide a conclusion by the author which may be fittingly quoted here. "The foregoing discussion (Part Two) sets forth what I consider to be the most interesting aspect of the question, what is law? As I have indicated, it is not merely a question of choosing labels. The three basic relations of law, to the state, to society and to ideal ends, still seem sufficiently comprehensive and yet sufficiently divisive to serve as general guides to the various senses in which 'law' is used. Of these the first seems the relation most useful in distinguishing law from other things and in characterizing lawyer's law. Law is characterized not only by its relation to the political association, the state, but also by its unique character as a legal meaning, that is, a statement meaning that from designated operative facts a certain kind of official conduct shall or should follow. This imperative or positive conception of law does not, as some people appear to believe, preclude the legal profession or any one else engaged in determining whether a particular meaning (of operative facts and official conduct) has validity in a certain state, from considering also both the possible and probable ends, ideals or otherwise, of such a legal norm, and its relations to various aspects of the society. This is so because clearly such relations are or should be considered in the process of law-making, adjudicative or legislative."

Part Three, What is the Law, as pointed out by the author, deals with the sources, forms and systematic relations of a body of developed law. The illustrations are largely of Anglo-American law. This, if not the most practical, is possibly the most interesting part. The uses of the law, the sources and the authoritative forms, the different types of legal norms, the significance of judicial precedents, the meaning of terms, and the various classifications of law are all outlined and discussed. Woven

into the study of these subjects are touches of subtle humor. This part carries the greatest number of citations and footnotes, and presents the materials used in judicial reasoning.

Here is outlined the official hierachies of Dr. Han Kelsen, exponent of the Pure Theory of Law, and Dean Roscoe Pound, advocate of "legal precepts" doctrine. It is regrettable that a more detailed presentation could not be made of custom as a source of the law and a fuller analysis of the principles of morality.

The largest part of the volume is devoted to What Should be the Law. Presented here are the chief types of jurisprudential theory of what should be the law. This part is predicated upon the supposition that "there is something which is (positive) law, that it can be different from what it is, and that if it can be changed there will be a different law that is." An examination of the general significance of legal philosophies is presented. This is followed by a study of the Greek theory of natural law and natural rights. Step by step the evolutionary development of man's struggle to determine what the law ought to be and do is considered. Contributions from the Stoics, Aquinas, John Locke, Montesquieu and many others, including Kant, Stammler, Lask and Radbruch illustrate the dreams and hopes as well as the criteria used in man's struggle to solve this yet insoluble problem. Here also will be found the modest philosophers of law, who would not presume to state what the law should be, but were content to state only what it is.

The outstanding historical and evolutionary theories of law are presented. The biological-cultural evolution of Herbert Spencer is contrasted with the ideal and material evolution of Hegel and Marx. The thumbnail, careful analysis of these mores makers and destroyers and their works is excellent.

No jurisprudential anthology would be complete without embodying a study of the philosophical writings of Jeremy Bentham, the indefatigable reformer of English judicial concept, the works of the psychologist William James, Harvard pragmatist, the logic and ethics of John Dewey, the liberalism and realism of Justice O. W. Holmes which are all present in brief review. After consideration of Pound's concept of jurisprudence based on the theory of social interests, the judicial process as set forth by Justice Benjamin Cardozo and a review of the origin and methods of American legal realism, the author again has some pertinent conclusions to make. The pupil fittingly pays homage to his teacher; "With these predilections in mind, I regard Roscoe Pound's theory of Social Interest (§ 4.62) as the best constructive philosophy of law that I can find. While its categories are largely derived historically and could be made more symmetrical by an imaginative reconstruction, yet it reveals the struggles and conflicts of a mature legal system. I would not venture to propose it as the legal philosophy for all time. Yet it seems that with some modifications it could serve as a structural guide for a good legal order in any good society that is practically conceivable."

The concluding part of this opus is concerned with the Judicial Process, Part Five. It treats the problems of separation of powers, the law settling function, judicial law making, judicial techniques and the psychology of judicial decisions. The part the good lawyer and judges play in this everchanging panorama of the search for truth and justice is gently suggested.

This volume represents a large part of the life-work of a man devoted to the worship of law. The love and reverence which he holds for this noble institution is inspiring. The scholarly research and labor by this learned educator in the preparation of this work is astonishing. His personal comments and observations, though too infrequent, add considerably to the book. His humility, his intellectual honesty and his unceasing search for the truth, all unconsciously revealed, proclaim this author an eminent legal philosopher.

*Tom P. Brady**

MARITAL PROPERTY IN CONFLICT OF LAWS. By Harold Marsh, Jr. University of Washington Press, Seattle, 1952. Pp. 263.

The author prepared this volume as his dissertation for the degree of Doctor of the Science of Law at Columbia University. His research was exhaustive, for he "at-

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*Circuit Judge, Brookhaven, Mississippi.

tempted to collect and discuss all of the American cases and statutes in this field." Of necessity, the field is therefore closely delimited. Within that field, he has undertaken not only to summarize what the rule of law is in each of the various jurisdictions, but to point out the inconsistencies, absurdities, and illogical holdings sometimes announced by the courts in their infrequent brushes with this particular question in conflict of laws. To say that the courts have sometimes reached absurd conclusions is, of course, to say that counsel briefing and arguing this question before those courts have often been equally inconsistent and illogical.

The author has, therefore, included the scholar's interpretation of what the proper rule should be, as well as compiling what the various rules are.

The prerequisites for the problem discussed are stated by the author as these: (1) that the operative facts of the case occur in two or more jurisdictions, or in a jurisdiction other than the forum; (2) that an issue of marital property is raised; and (3) that the substantive rules of the jurisdictions involved are in conflict on the issue raised.

Basically, the problem is viewed from: (a) the common law standpoint, and (b) the community-property states' standpoint. The book deals with the wife's interest in acquisitions of the husband; the husband's interest in acquisitions of the wife; and co-ownership by husband and wife. These questions are brought in focus by the necessity for or attempts at distribution of the property upon death or divorce; by transfer by one or the other spouse; or by the efforts of creditors or transferees to seize or hold the property.

The conflict of laws question arises in connection with the above named situations with relation to property, for example, acquired in a state other than the domicile of the spouse; in taking community property into a common law state from a community property state; or in taking property from a common law state into a community property state.

Eighteen cases from Mississippi jurisprudence are mentioned or discussed. These cases have involved such questions as the surviving spouse's rights, on renunciation of the will, in personal property acquired or located in a foreign jurisdiction; and transfer by a woman of her "separate" property after marriage. The author points out that in many of the cases cited our court, as have others, has not dealt with the question as one either of marital property or conflict of laws. For the practicing attorney this would suggest a possible theory not as yet tested in such situations.

Books dealing with what the law should be, rather than summarizing what it is and has been, are not in great demand in the practice of law. Insofar as this volume is a scholar's dissertation for his graduate degree, it is not a ready reference book for the working library. Insofar as it analyzes and suggests a possible new thory or approach to old questions met in the practice, it should be of value to the attorney dealing with questions of marital property involving such jurisdictions as our sister state of Louisiana for example, which we know to be near unto us geographically yet far and foreign to us in its jurisprudence.

*Lampkin Butts**

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*Welch, Gibbes and Butts,
Laurel, Mississippi.

BOOKS RECEIVED

American Constitutional Custom: A Forgotten Factor in the Founding. By Burleigh C. Rodick. New York: Philosophical Library, 1953. Pp. 244. $4.75.

Effective Legal Research. By Miles O. Price and Harry Bitner. New York: Prentice-Hall, Inc., 1953. Pp. 633. $10.00.

International Law. By William W. Bishop, Jr. New York: Prentice-Hall, Inc., 1953. Pp. 735. $9.75.

The Libraries of the Legal Profession. Survey of Legal Profession. Lord Baltimore Press, 1953. Pp. 443. $6.00.

Bibliography of Accounting and Tax Articles. By Cecil E. Coe. Englewood, California, 1953.

The Federal Courts and the Federal System. By Henry M. Hart, Jr. and Herbert Wechsler. Brooklyn: The Foundation Press, Inc., 1953. Pp. 1445. $11.00.

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